86-730

*No.*

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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# In The
# Supreme Court of the United States
## October Term, 1986

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**GERALDINE G. CANNON,**

*Petitioner,*

*v.*

**LOYOLA UNIVERSITY OF CHICAGO, *et al.*,**

*Respondents.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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31pp

## QUESTIONS PRESENTED

1. Whether the jurisdictional exception to dismissals which operate as adjudications on the merits under Rule 41(b) of the Federal Rules of Civil Procedure is limited to dismissals for lack of subject matter jurisdiction to reach the merits of any claim sought to be stated or for lack of jurisdiction to decide whether any claim upon which relief may be granted has been properly stated.

2. Whether a judgment affirmed, in part, for lack of federal jurisdiction over legal claims for monetary relief by reason of the Eleventh Amendment and, in part, on grounds of laches as to the related equitable claims, constitutes a final judgment on the merits and bars any further claims on the same cause of action under the doctrine of *res judicata.*

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[Note: Petitioner reserves the right to argue Question 3 in the event certiorari is granted on either or both of the above questions, but does not include Question 3 among the reasons for the grant of certiorari.]

3. Whether affirmative answers to both of the above questions are so clear as to warrant the imposition of sanctions for maintaining this action, particularly where the district court did not accept the respondents' affirmative position on the first question.

## PARTIES

The parties to the proceeding in the court of appeals were the petitioner, Geraldine G. Cannon, and seven respondents:

Loyola University of Chicago (*"Loyola"*),

Northwestern University (*"Northwestern"*),

Rush-Presbyterian-St. Luke's Medical Center (*"Rush"*),

Southern Illinois University (*"S.I.U."*),

The University of Chicago (*"Chicago"*),

University of Health Sciences/The Chicago Medical School (*"Chicago Medical"*), and

the board of trustees of the University of Illinois (*"Illinois"*).

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No.

# In The
# Supreme Court of the United States
## October Term, 1986

GERALDINE G. CANNON,

*Petitioner,*

*v.*

LOYOLA UNIVERSITY OF CHICAGO, *et al.*,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Geraldine G. Cannon, prays, that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in the above – entitled case. No. 85-1987 (7th Cir. 1986).

## OPINION BELOW

The opinion of the court of appeals is reported at 784 F.2d 777, and a copy of the slip opinion is set out in the Appendix to this petition at A-1. The opinion of the district court is reported at 609 F.Supp. 1010 (N.D. Ill. 1985).

## JURISDICTION

The judgment of the court of appeals is dated February 25, 1986. A timely petition for rehearing was denied on April 3, 1986 and a supplemental petition for rehearing filed with leave of court was denied on May 27, 1986. On August 14, 1986, Justice Brennan signed an order extending the time for filing this petition for writ of certiorari to and including October 24, 1986. No. A-110. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

## STATEMENT OF THE CASE

Petitioner brought this action for breach of contract, asserting that each respondent's former age criterion for admission to medical school violated the public policy set out in Title IX of the Education Amendments of 1972 (*"Title IX"*), 20 U.S.C. §1681 *et seq.* She claimed that the illegal age criterion should be excluded from the terms on which each respondent had agreed to consider her application and that use of the age criterion violated the agreement to observe Title IX in each respondent's federal funding contract. Jurisdiction in the district court was based on 28 U.S.C. §§1331 and 1343 (4).

The district court dismissed the complaint, holding that prior judgments in three related actions constitute a bar to the present action on the basis of general preclusion principles and awarded respondents their attorneys' fees pursuant to Rule 11, Fed.R.Civ.P. The court of appeals affirmed holding that the jurisdictional exception to dismissals which operate as adjudications on the merits under Rule 41(b), Fed.R.Civ.P., did not apply to the dismissal of petitioner's prior complaints for failure to state a claim upon which relief could be granted in federal court. It reasoned that the district court had subject matter jurisdiction to reach the merits of claims petitioner

had sought to state against Chicago and Northwestern in the first two prior actions. It further reasoned that the question of whether the prior complaints against those schools had properly stated a claim upon which relief could be granted must have been decided after and not before the court had assumed jurisdiction over the controversy. App. at A-4 to A-6. The court of appeals further held that partial summary judgments on grounds of laches in a third prior action against the five other respondents, Chicago Medical, Loyola, Rush, S.I.U. and Illinois, barred the present action against them even though related legal claims for monetary relief against S.I.U. and Illinois had been dismissed on the basis of their jurisdictional immunity under the Eleventh Amendment. App. at A-6 to A-8.[1]

**The Prior Cases.**

Petitioner had commenced the first two prior actions against Chicago and Northwestern in the summer of 1975. She claimed that the age criterion of each school, due to its alleged disparate impact upon women, violated Title IX and Section 799 of the Public Health Service Act, 42 U.S.C. §295h-9; and directly violated the Civil Rights Act of 1871, 42 U.S.C. §1983, and the Equal Protection Clause of the Fourteenth Amendment, the Age Discrimination in Employment Act of 1967 ("*ADEA*"), 29 U.S.C. §626, and Ill.Rev.Stat Ch.48, Sec. 884 *et seq.*, the Illinois Act to prohibit unjust discrimination in employment because of age. The district court dismissed the complaints because (1) there were

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[1] The court of appeals did not repeat or rely upon the district court's improper and inaccurate application of general preclusion principles on the basis of matters outside the complaint. Rule 12(b), Fed.R.Civ.P., prohibits the consideration of matters outside the pleading on a motion to dismiss for failure to state a claim upon which relief may be granted without treatment of the motion as one for summary judgment. Respondents' Rule 12(b)(6) motions were not so treated. Petitioner acknowledged that this action would be barred if the district court's statements on matters outside the pleading were accurate. They were not.

no sufficient allegations of state action to support a claim under §1983 and the Fourteenth Amendment; (2) no claim was stated under the ADEA because the schools were not primarily employers or employment agencies; and (3) no private right of action existed under Title IX or the Public Health Service Act. With that dismissal of all federal claims before trial, the district court did not exercise pendent jurisdiction to rule upon petitioner's claims under state law. *Cannon v. University of Chicago et al.*, 406 F.Supp. 1257 (N.D.Ill. 1976). The court of appeals affirmed. 559 F.2d 1063 (7th Cir. 1977). Petitioner was granted a writ of certiorari on the question of whether Title IX authorized a private right of action. This Court reversed and remanded, holding that Title IX did authorize a private right of action. 441 U.S. 677 (1979).

After remand, the district court again dismissed the actions on the ground that the complaints failed to allege specific facts on which a finding of intentional discrimination could be based pursuant to petitioner's general allegation that the schools' conduct was "arbitrary and invidious". (Unpublished orders N.D.Ill.Nos. 75 C 2402 and 75 C 2724, May 23, 1980.) The court of appeals affirmed the second dismissal. 648 F.2d 1104 (7th Cir. 1981). Contrary to the district court, however, it held that the allegation of arbitrary and invidious conduct was no longer applicable after the §1983 claims had been dismissed. *Id.* at 110. Also contrary to the district court, it observed that while the liberal pleading requirements of Rule 9(b), Fed.R.Civ.P., provide that intent may be pleaded generally, the arbitrary and invidious language contained no necessary implication of intentional discrimination *Ibid.*

Petitioner then moved for leave either to amend her complaints or to present motions to amend in the district court on the ground that she already had offered amendments alleging intentional discrimination against women under Title IX in response to the schools' district court argument that the arbitrary and invidious allegation was no longer applicable.

The motion was denied without comment. Thereafter, this Court denied certiorari to review the judgment and opinion of the court of appeals which had focused primarily on the issue of whether intentional discrimination was required to violate Title IX. 454 U.S. 1128 (1981). Petitioner had maintained that issue was premature because she proposed to meet the intentional standard in the district court.[2] On later appeals from the denial of petitioner's motions for relief from judgment in order to amend under Rules 15(a) and 60(b), Fed.R.Civ.P., the court of appeals explained that amendment ordinarily is not allowed after the affirmance of a judgment on appeal and that, without leave of the appellate court, the district court lacks jurisdiction to allow amendment. (Unpublished orders 7th Cir. Nos. 82-1107 and 82-1120, May 13, 1982 and October 6, 1982).

Meanwhile, petitioner had filed a single suit against Chicago Medical, Loyola, Rush, S.I.U. and Illinois in 1979. As in the suits against Chicago and Northwestern, she claimed that denial of her medical school applications constituted sex discrimination in violation of Title IX. She also claimed that the schools' age criteria for admission violated the Age Discrimination Act of 1975, 42 U.S.C. §6101 *et seq.*, and that the two state schools, S.I.U. and Illinois, had violated §1983 and the Fourteenth Amendment.

The district court allowed petitioner to amend the complaint pursuant to Rule 15(a), Fed.R.Civ.P., with an allegation of intentional discrimination against women under Title IX to cure the defect for which the court of appeals had affirmed the dismissal of the prior complaints against Chicago and Northwestern. It held, however, that no relief against any

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[2] *See*, 648 F.2d at 1105 n.1. Thereafter, in *Guardians Assn. of Police v. Civil Service Comm. of the City of N.Y.*, 463 U.S. 582 (1983), this Court upheld an "effect" standard in the applicable regulations under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.*, the legislation on which Title IX was patterned.

of the schools could be had under the Age Discrimination Act, as that Act had not yet taken effect at the time her applications were rejected. The district court further held that no monetary relief could be obtained under Title IX and that the Eleventh Amendment barred the recovery of monetary relief from S.I.U. and Illinois in federal court under §1983 and the Fourteenth Amendment. The district court entered judgment dismissing the legal claims for damages and granting partial summary judgments on the remaining equitable claims against each school. The partial summary judgments in favor of Rush, Loyola and Chicago Medical were based on grounds of laches and those in favor of S.I.U. and Illinois on grounds of mootness. The district court also noted that all of the schools were entitled to summary judgment for mootness on the Title IX claims as well because they all had abolished age as a criterion for admission to their 1980 and subsequent entering classes. (Unpublished orders N.D.Ill.No.79 C 5009, October 13, 1981 and June 15, 1982).

The court of appeals affirmed the dismissal of legal claims for monetary relief which were governed by the statute of limitations on the same Title IX and Eleventh Amendment grounds as the district court had based such dismissal. The court of appeals, however, affirmed the partial summary judgments in favor of each school on the remaining equitable claims solely on grounds of laches. It did not affirm the district court's ruling on mootness. *Cannon v. University of Health Sciences, et al.*, 710 F.2d 351 (7th Cir. 1983).

Since the court of appeals already had ruled in the first two cases that amendment ordinarily is not allowed after the affirmance of a dismissal on appeal, even where the same amendment was concurrently allowed under Rule 15(a) in the third related case which then was still in the district court, and since petitioner could not request leave to amend after appeal on the ground that the statute of limitations had expired on her contract claims while she appealed the mootness ruling, this action followed.

## REASONS FOR GRANTING THE WRIT

The Court should grant this petition for a writ of certiorari for two reasons that the Court has traditionally found compelling. First, the decision of the court of appeals, limiting the jurisdictional exception in Rule 41(b) to dismissals for lack of subject matter jurisdiction to reach the merits of any claim sought to be stated or for lack of jurisdiction to decide whether any claim upon which relief may be granted had been properly stated, has decided a federal question in a way in conflict with the decision of this Court in *Costello v. United States*, 365 U.S. 265 (1961). Such limitation also conflicts with decisions of the Fifth and Ninth Circuits in *Carter v. Telectron, Inc.*, 554 F.2d 1369 (5th Cir. 1977), *cert. denied* 439 U.S. 1074 (1979), and *Johnston v. Earle*, 245 F.2d 793 (9th Cir. 1957). Second, the court of appeals has decided an important question of federal law under the Eleventh Amendment which has not been, but should be, settled by this Court.

### I. The Decision Below Conflicts With Decisions Of This Court And Of Other Courts Of Appeals On The Jurisdictional Exception In Rule 41(b).

The court of appeals based its holding that the jurisdictional exception to dismissals which operate as adjudications on the merits under Rule 41(b) is not applicable to the dismissal of petitioner's prior claims against Chicago and Northwestern on two grounds. Both grounds conflict with the decision of this Court in *Costello* and with the decisions of the Fifth and Ninth Circuits in *Carter* and *Johnston*.

First, the court of appeals held that the district court had subject matter jurisdiction to reach the merits of the claims petitioner had sought to state against Chicago and Northwestern under 28 U.S.C. §1331. App. at A-6. That is clearly correct. It was also clearly true that the district court had subject matter jurisdiction to reach the merits of the claims sought to be stated in the prior actions involved in *Costello, Carter* and *Johnston*. Indeed, this Court squarely held in *Costello* that the jurisdictional exception in Rule 41(b) is not limited to prior judgments which are void or subject

to collateral attack for lack of jurisdiction over the person or subject matter. 365 U.S. at 285.

Second, the court of appeals held that the dismissal of petitioner's prior complaints against Chicago and Northwestern was an adjudication on the merits because the question of whether the complaints stated a cause of action on which relief could be granted must have been decided after and not before the court had assumed jurisdiction over the controversy, citing *Bell v. Hood*, 327 U.S. 678, 681-82 (1945). It was also true that the question of whether the prior complaints involved in *Costello, Carter* and *Johnston* had stated a claim upon which relief could be granted must have been decided after and not before the courts had assumed jurisdiction over those controversies. Nevertheless, this Court in *Costello* and the Fifth and Ninth Circuits in *Carter* and *Johnston* all held that dismissal of the prior complaints for failure to state a claim upon which relief could be granted resulted in a lack of jurisdiction and did not bar further claims on the same cause of action under the doctrine of *res judicata.*

The decision of this Court in *Bell* did not involve either Rule 41(b) or the doctrine of *res judicata.* Accordingly, *Bell* can provide only *obiter dictum* in support of the decision below. The Ninth Circuit in *Johnston* held that failure of a complaint to state a proper claim under the laws of the United States required dismissal for lack of jurisdiction under 28 U.S.C. §1331. The jurisdiction of a court under *Bell* even to consider whether it had jurisdiction was expressly distinguished. 245 F.2d at 795-96. In *Carter* the Fifth Circuit held that failure to state a proper claim under federal civil rights law has the effect of depriving federal courts of subject matter jurisdiction "and renders the court powerless to make a decision on the merits" thus requiring dismissal "for lack of jurisdiction" under Rule 41(b). 554 F.2d at 1370.

> "If a dismissal is for a defect in pleadings that does not reach the merits, as is generally true for a dismissal under Rule 12(b)(6), it is inconsistent with the

whole spirit of the rules to regard the dismissal as an adjudication upon the merits."

9 Wright and Miller, Federal Practice and Procedure §2373 p.239.

**II. The Decision Below Presents An Important Question of Federal Law Under The Eleventh Amendment That Should Be Settled By This Court.**

The Eleventh Amendment decisions of this Court have balanced the limitation on the judicial power of the United States with the requirements of the Supremacy Clause. Recently, in *Green v. Mansour,* __U.S.__, 106 S.Ct. 423 (1985), the Court considered the potential effect of the doctrine of *res judicata* based on a federal decision for prospective relief under the Supremacy Clause on the issue of liability resulting in an "end run" around the Eleventh Amendment and *Edelman v. Jordan,* 415 U.S. 651 (1974), by reducing a later state court action for damages to a mere accounting proceeding. This case presents a direct extension of that concern.

Generally, federal courts may entertain actions under the Supremacy Clause for prospective relief from future violation of federal laws, but actions for retrospective monetary relief for past violations are barred by the Eleventh Amendment. A dicision on the merits in a federal action for prospective relief could have a *res judicata* effect on the issue of liability in a later state court action for retrospective relief. Under *Green,* however, when a claim for prospective relief becomes moot, declaratory or notice relief which can impact only on a later state court action is barred by the Eleventh Amendment.

In this case the affirmative defense of laches was sustained with respect to petitioner's prior claims for prospective relief against S.I.U. and Illinois under §1983 and the Fourteenth Amendment. That defense, however, could not have been asserted with respect to petitioner's related legal claims which are governed by the statute of limitations. The application, if any, of the doctrine of *res judicata* under such circumstances

has not been, but should be, settled by this Court.

Petitioner submits that, contrary to the decision of the court of appeals, an Eleventh Amendment dismissal of legal claims by a federal court remains a dismissal "for lack of jurisdiction" and does not operate as an adjudication on the merits under Rule 41(b). There is no federal interest in the defense of laches sufficient to invoke the Supremacy Clause in controlling the outcome of a later proceeding, state or federal, under the doctrine of *res judicata*.

Respondents' position on the questions presented, including the imposition of sanctions, was based primarily on the burden this litigation has placed on them. Petitioner, however, has been subjected to the burden of the same litigation. A decision on the substantive merits of petitioner's civil rights claims has been avoided thus far because the district court granted respondents' motions to dismiss some or all of the claims against each of them on grounds which petitioner could not cure by amendment or refiling. The court of appeals affirmed the prior judgments, but on grounds which she could so cure.[3] While respondents have the right to raise every pleading objection available, they can hardly complain of the burden their pursuit of such objections has engendered, particularly since petitioner offered to meet each objection to the sufficiency of her allegations as soon as the objection was raised.

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[3] *See,* the statement of The Prior Cases at 3 to 6 *supra.*

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully Submitted,

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October 1986

## APPENDIX


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In the

# United States Court of Appeals

## For the Seventh Circuit

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No. 85-1987

GERALDINE G. CANNON,

*Plaintiff-Appellant,*

*vs.*

LOYOLA UNIVERSITY OF CHICAGO, et al.,

*Defendants-Appellees.*

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Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 8063—Marvin E. Aspen, *Judge.*

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ARGUED JANUARY 8, 1986—DECIDED FEBRUARY 25, 1986

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Before BAUER, WOOD and COFFEY, *Circuit Judges.*

BAUER, *Circuit Judge.* Plaintiff Geraldine Cannon, ("Mrs. Cannon"), brought suit against seven defendant medical schools claiming that each medical school's denial of her application was a breach of contract because such action was unlawful under Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681 *et seq.* The district court dismissed the complaint, holding that judgments entered against Mrs. Cannon and in favor of the universities in three prior suits constitute a bar to the present action. We affirm the judgment of the district court including its award of attorney fees and costs plus the costs of this appeal to defendants.

I.

Mrs. Cannon applied for admission to the 1975 entering class at each of the defendant medical schools; Loyola University of Chicago; Northwestern University; Rush Presbyterian-St. Lukes Medical Center; Southern Illinois University; University of Health Sciences/The Chicago Medical School; The University of Chicago and The University of Illinois. Each of the schools denied her application. The present appeal marks the plaintiff's thirteenth time she has been before the court to obtain judicial relief from the decisions of the universities not to admit her to medical school ten years ago.

In July of 1975, Mrs. Cannon first brought suits against the University of Chicago ("Chicago") and Northwestern University ("Northwestern"), which were consolidated in the district court and on later appeals. In these actions Mrs. Cannon claimed that Chicago and Northwestern applied an age criterion in rejecting her application that itself violated the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 626, or that, due to its alleged disparate impact upon women, violated the Civil Rights Act of 1871, 28 U.S.C. § 1983, Title IX and/or Section 799 of the Public Health Service Act 42 U.S.C. § 295h-9. The district court dismissed Mrs. Cannon's complaint because (1) there were no sufficient allegations of state action to support an action under § 1983; (2) no claim upon which relief could be granted could be stated under the ADEA because the universities were neither employers nor employment agencies; and (3) no private right of action existed under Title IX or the Public Health Service Act. We affirmed. Plaintiff sought and was granted a writ of certiorari limited solely to the question of the existence of a private right of action under Title IX. The Supreme Court reversed and remanded the case, holding that a private right of action under Title IX was authorized.

Upon remand, Chicago and Northwestern moved to dismiss the complaints on the ground that they failed to state

a claim upon which relief could be granted in that no allegation of "purposeful" discrimination as required by Title IX was set forth. The district court held these motions in abeyance while conducting a six day evidentiary hearing upon Mrs. Cannon's petition for a preliminary injunction. The petition was denied, and we affirmed the denial on April 25, 1980.

On May 23, 1980, the district court granted the universities' motions and dismissed the complaints on the ground that plaintiff failed to state a claim because she failed to allege that the defendants had purposefully discriminated against her because of her sex. We affirmed, holding that a violation of Title IX required purposeful discrimination. Plaintiff then moved for leave to either amend her complaints or to present motions to amend in the district court. We denied the motion. Plaintiff then filed petitions for writs of mandamus and certiorari, both of which were denied by the Supreme Court in 1981.

Mrs. Cannon filed a single suit against the remaining five defendants, Loyola University of Chicago ("Loyola"), Rush-Presbyterian St. Luke's Medical center ("Rush"), University of Health Sciences/Chicago Medical School ("Chicago Medical"), Southern Illinois University ("S.I.U.") and the University of Illinois ("Illinois"). As in the earlier suits against Chicago and Northwestern, Mrs. Cannon claimed that these five universities' denial of her medical school application constituted sex discrimination in violation of Title IX. Mrs. Cannon also claimed that each defendant violated the Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-6107, and that S.I.U. and Illinois had violated the Civil Rights Act of 1871, 28 U.S.C. § 1983.

The district court held that no relief against any of the defendant universities could be had under the Age Discrimination Act, as that Act had not yet taken effect at the time her applications were rejected. The district court further held that no monetary relief could be obtained from any of the defendants under Title IX, and that the Eleventh Amendment barred the recovery of monetary

relief against S.I.U. and Illinois. The district court entered summary judgment in favor of all five universities, basing those in favor of Rush, Loyola and Chicago Medical on grounds of laches and those in favor of S.I.U. and Illinois on grounds of mootness. We affirmed the judgments in favor of all defendants, but as to those in favor of S.I.U. and Illinois solely on grounds of laches. Mrs. Cannon's present suit, which we now address on appeal, alleges that all seven schools are liable for breach of contract under Title IX.

II.

The dismissal of plaintiff's prior suits against Chicago and Northwestern for failure to state a claim upon which relief could be granted are judgments on the merits and constitute a *res judicata* bar as to those two schools in the action below.

Under the doctrine of *res judicata*, a decision in an earlier action will constitute a complete bar to a later action if (1) the parties to the later suit are the same as or in privity with those in the earlier suit, (2) the later suit alleges the same cause of action as the earlier suit, and (3) a court of competent jurisdiction entered a valid final judgment on the merits in the earlier suit. *Federated Department Stores v. Moitie*, 452 U.S. 394, 398 (1981); *Mandarino v. Pallard*, 718 F.2d 845, 849 (7th Cir. 1983), *cert. denied*, 105 S.Ct. 116 (1984).

Mrs. Cannon does not dispute the first two requirements for application of *res judicata*—identity of parties and identity of causes of action. Both Chicago and Northwestern were parties in the prior action. Although Mrs. Cannon's theory of relief has changed slightly, her complaint is based on the same facts as her previous suits. Mrs. Cannon claimed a right to relief directly under Title IX in the first two suits, while here Mrs. Cannon claims that defendants' alleged violation of Title IX constituted a breach of contract. Thus, while the theory of relief may have changed, the cause of action remains the same.

*Cemer v. Marathon Oil Co.*, 583 F.2d 830 (6th Cir. 1978). Each suit sought to remedy the same single alleged wrong.

The third requirement under the doctrine of *res judicata*, that a court of competent jurisdiction entered a valid final judgment on the merits in the earlier suit, is the only requirement that Mrs. Cannon disputes. The only issue raised is whether the dismissals of Mrs. Cannon's prior suits against Chicago and Northwestern were judgments on the merits. The district court dismissed Mrs. Cannon's prior actions against Chicago and Northwestern pursuant to Rule 12(b)(6) for failure to state a claim upon which relief could be granted. We affirmed on that basis. The Supreme Court denied certiorari. Under Rule 41(b) of the Federal Rules of Civil Procedure the district court's dismissals were adjudicated on the merits. Rule 41(b) provides that:

> "[U]nless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

A dismissal for failure to state a claim under Rule 12(b)(6) is a dismissal within the meaning of Rule 41(b) and therefore constitutes an adjudication on the merits. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 at n.3 (1981); *Bell v. Hood*, 327 U.S. 678, 682 (1945); *Rinehart v. Locke*, 454 F.2d 315, (7th Cir. 1971).

Mrs. Cannon seeks to avoid this result by arguing that the district court dismissal for failure to state a claim resulted in a lack of federal jurisdiction. Essentially, Mrs. Cannon argues that jurisdiction in the prior actions against Chicago and Northwestern was based on 28 U.S.C. § 1343. Since Section 1343 grants jurisdiction only over "any civil action authorized by law," Mrs. Cannon argues that a Rule 12(b)(6) dismissal results in there being no action "authorized by law" and thus results in a lack of federal court jurisdiction.

Mrs. Cannon's argument is without merit for two reasons. First, Mrs. Cannon sought equitable relief and damages of $15,000 in her prior suits against Chicago and Northwestern. Hence, the district court had subject matter jurisdiction under Section 1331 to reach the merits of the complaint.

Second, long standing Supreme Court precedent supports defendants' position that Mrs. Cannon's prior dismissal for failure to state a claim was an adjudication on the merits. In *Bell v. Hood*, *supra*, plaintiff alleged violations of her Fourth and Fifth Amendment rights. The district court dismissed for lack of subject matter jurisdiction under Section 1331 because of its view that no recovery could be had. The circuit court affirmed, and the Supreme Court reversed, stating:

> "Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the Court has assumed jurisdiction over the controversy." 327 U.S. at 681-82.

Thus, Mrs. Cannon's attempt to characterize the dismissal of her prior action for failure to state a claim as "jurisdictional" is precluded by long standing Supreme Court precedent.

## III.

The prior judgments in favor of Loyola, Rush, Chicago Medical, S.I.U. and Illinois are also final adjudications on the merits, and bar Mrs. Cannon's suit against these universities.

As with her claims against Chicago and Northwestern, Mrs. Cannon does not dispute that the first two requirements for *res judicata*—identity of parties and identity of cause of action—have been met by the prior judgments in favor of Chicago Medical, Rush, Loyola, S.I.U. and Illinois. Mrs. Cannon argues only that the prior judgments against these defendants were not final judgments on the merits. Quite plainly, the judgment, both as entered by the district court, and this court, disposed of all of the claims asserted against all of the defendants in that action. Indeed, were this not the case, Mrs. Cannon could not have appealed that judgment to this court since the court would have lacked jurisdiction under 28 U.S.C. § 1291 to hear the appeal.

As stated above, Mrs. Cannon brought a claim of unlawful discrimination under the Age Discrimination Act of 1975, 42 U.S.C. § 1601 *et seq.* against all defendants. These claims were dismissed for failure to state a claim upon which relief could be granted. The district court limited Mrs. Cannon's claim to an action for equitable relief and entered summary judgment in favor of defendants in Mrs. Cannon's Title IX claim on the basis of laches. Her Section 1983 claim against S.I.U. and Illinois was dismissed on the basis of laches as well.

In a second order, dated June 15, 1983, the district court vacated the prior order to the extent it granted judgment on the Section 1983 claims against S.I.U. and Illinois on grounds of laches. In that same order, the district court held that Mrs. Cannon was barred by the Eleventh Amendment from recovering damages from S.I.U. or Illinois, and that her claims for equitable relief under Section 1983 were moot.

We affirmed the judgments entered against Mrs. Cannon, but in regard to the Section 1983 claims against S.I.U. and Illinois did so only on the grounds of laches.

For purposes of applying the doctrine of *res judicata* it is this court's prior ruling that is controlling.

> "A judgment affirmed on appeal has a conclusive effect, but if the appellate court affirms on grounds that differ from those relied on by the lower court, the conclusiveness of the judgment as *res judicata* and as collateral estoppel are determined by the appellate decision." IB Moore's Federal Practice § 0.416[2] at 518.

Under this analysis, the district courts' dismissal of Mrs. Cannon's ADEA claim for failure to state a claim upon which relief could be granted was clearly a decision on the merits of that claim. The holding of *Bell v. Hood* that a dismissal for failure to state a claim calls for judgment on the merits is directly applicable.

The disposition of Mrs. Cannon's Title IX and Section 1983 claims on grounds of laches is equally a judgment on the merits. In *McCrocklin v. Fowler*, 411 F.2d 580 (7th Cir. 1969), we held that the district court correctly dismissed a suit because a privy of the plaintiff had brought a prior action on the same claim in the Court of Claims, and the prior action had been dismissed on the basis of the statute of limitations and laches. The district court noted that "the prior suit in the Court of Claims was on the merits" and we affirmed. Thus, all three requirements for application of *res judicata* have been met. The present suit is barred and was properly dismissed by the district court.

## IV.

The district court did not abuse its discretion when it awarded defendants their fees on the motion to dismiss. We are in complete agreement with the district court that Mrs. Cannon's filing of a complaint in this action was an egregious and blatant violation of Rule 11 of the Federal Rules of Civil Procedure. Under Rule 11 an attorney's signature on a pleading

> constitutes a certificate by him that he has read the pleading . . . that to the best of his knowledge, information and belief formed after reasonable inquiry

it is well grounded in fact and is warranted by existing law or a good faith argument for extension, modification or reversal of existing law and that it is not interposed for any improper purpose.

Mrs. Cannon's claim is barred by well established principles of *res judicata*, as enunciated by the United States Supreme Court. Mrs. Cannon's ten year history of litigation demonstrates her penchant for harassing the defendants. Where a violation of Rule 11 occurs, the court is expressly given the power to award the opposing party his costs, including attorney fees, incurred by reason of the violation. It is only fair that Mrs. Cannon bear the attorney fees and costs plus the costs of this appeal that her penchant for litigation has caused non profit institutions of higher learning for far too long.

For the foregoing reasons the judgment of the district court is

AFFIRMED.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

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JUDGMENT – ORAL ARGUMENT

# United States Court Of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
February 25, 1986.

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge

**GERALDINE G. CANNON,**
*Plaintiff-Appellant,*

*vs.*

**LOYOLA UNIVERSITY OF CHICAGO, et al.,**
*Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 84 C 8063

**Judge Marvin E. Aspen**

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

# United States Court Of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
April 3, 1986.

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge

**GERALDINE G. CANNON,**
*Plaintiff-Appellant,*

*vs.*

**LOYOLA UNIVERSITY OF CHICAGO, et al.,**
*Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

## ORDER

On consideration of the petition for rehearing filed in the above entitled cause by Geraldine G. Cannon, Plaintiff-Appellant, and all of the judges on the original panel have voted to deny a rehearing and suggestion for rehearing *en banc*. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *en banc* be, and the same is hereby DENIED.

# United States Court Of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
May 27, 1986.

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge

**GERALDINE G. CANNON,**
*Plaintiff-Appellant,*

*vs.*

**LOYOLA UNIVERSITY OF CHICAGO,**
*Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 84 C 8063

**Marvin E. Aspen,** Judge.

## ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above entitled cause by Geraldine G. Cannon, plaintiff-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny the petition for rehearing and suggestion for rehearing *en banc*. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *en banc* be and the same is hereby DENIED.

86-730

No.

Supreme Court, U.S.
FILED
OCT 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

# Supreme Court of the United States

October Term, 1986

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**GERALDINE G. CANNON,**

*Petitioner,*

*v.*

**LOYOLA UNIVERSITY OF CHICAGO, *et al.*,**

*Respondents.*

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## SUPPLEMENTAL APPENDIX
## TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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October 1986

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Opinion of Court of Appeals Filed On May 6, 1981 In *Cannon v. University of Chicago, et al.*, 648 F.2d 1104 (7th Cir. 1981) . . . . . D-1

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

**GERALDINE G. CANNON,**
*Plaintiff,*

*v.*

**LOYOLA UNIVERSITY OF CHICAGO; NORTHWESTERN UNIVERSITY; RUSH PRESBYTERIAN-ST. LUKES MEDICAL CENTER; SOUTHERN ILLINOIS UNIVERSITY; UNIVERSITY OF HEALTH SCIENCES/THE CHICAGO MEDICAL SCHOOL; THE UNIVERSITY OF CHICAGO; and the Board of Trustees of THE UNIVERSITY OF ILLINOIS,**
*Defendants.*

No. 84 C 8063

## MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, District Judge:

Geraldine Cannon wants to be a physician. She applied ten years ago to seven Illinois medical schools, and each of them rejected her. Still determined to become a doctor, Cannon sued all of these schools in federal court to gain admission. Her ten-year journey through the federal judiciary has taken her through several district courts, the Seventh Circuit and the Supreme Court. Every suit she brought was ultimately dismissed for one reason or another. Cannon is here again. This time she has sued all seven medical schools in one action, alleging different theories of recovery than before, but alleging the same underlying facts as before. The seven defendants, experiencing *deja vu,* have moved to dismiss the case under the doctrine of *res judicata.* For the reasons spelled out below, we grant the motions to dismiss.

The undisputed history of Cannon's quest has been detailed in earlier opinions. 559 F.2d 1063 (7th Cir. 1976); 710 F.2d 351 (7th Cir. 1983). We will only summarize this history here.

In late 1974 Cannon applied for admission to the 1975 entering class of every medical school in Illinois, each of which is a named defendant in this suit. Every school rejected her application. She was a 39-year old nurse at the time. As a matter of policy, each of these schools either rejected or disfavored applicants over 30.

In the summer of 1975, Cannon sued two of these schools, the University of Chicago ("Chicago"), No. 75 C 2724, and Northwestern University ("Northwestern"), No. 75 C 2402. She alleged, among other things, sex discrimination in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, age discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, and violations of constitutional rights under 42 U.S.C. § 1983. Her theory was that the school's age criteria exerted a disparate impact on women applicants, who were more likely to be older than male applicants because of decisions to bear and raise children.[1] The district court dismissed the complaint for failure to state a claim upon which relief could be granted. 406 F.Supp. 1257 (N.D. Ill. 1976) (Hoffman, J.) The most relevant part of the decision was that Title IX contained no private right of action.[2] 406 F.Supp. at 1259. The Seventh Circuit affirmed. 559 F.2d 1063 (1976). The Supreme Court reversed, holding that Title IX created an implied right of action. 441 U.S. 677, 99 S.Ct. 1946 (1979).

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[1] If Cannon were rejected because of age today, she might not have had to use this indirect sex discrimination theory. In late 1975, Congress passed the Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-07, which became effective in 1979, when the Department of Health, Education & Welfare passed interpretative regulations. These regulations stated that medical schools could not base admissions decisions on age. *See* Cannon v. University of Health Sciences/The Chicago Medical School. 710 F.2d 351, 354 (7th Cir. 1983).

[2] The court also held that the schools were not "employers" under the Age Discrimination in Employment Act, and that no state action supported the § 1983 claim.

The case was remanded for consideration of the Title IX claim only. In an oral order dated May 23, 1980, the district court again dismissed the case under Fed.R.Civ.P. 12(b)(6), this time holding that Title IX redresses intentional sex discrimination only, and that Cannon had failed to state a claim of intentional discrimination. The Seventh Circuit affirmed, 648 F.2d 1104 (1981), and the Supreme Court denied certiorari. 460 U.S. 1013, (1983). Her avenues of appeal exhausted, Cannon returned to the district court to seek post-judgment relief under Fed.R.Civ.P. 60. This Court [3] denied her motion. She did not appeal.

Cannon sued the remaining five schools in one action filed on November 29, 1979. No. 79 C 5009. She sought monetary and injunctive relief under Title IX and also sued the two state universities under 42 U.S.C. § 1983. She had no better luck with this suit. On October 13, 1981, Judge Robson dismissed the complaint for failure to state a claim. The Court held that the doctrine of laches barred the suit as to all defendants except Chicago Medical School ("Chicago-Med"), which had not posed the defense. Leave was granted to file an amended complaint against Chicago-Med, but leave to amend was denied as to the other defendants. On June 15, 1982, Judge Robson modified the earlier order. Chicago-Med, too, was dismissed because of laches. The dismissal of the two state schools, University of Illinois ("Illinois") and Southern Illinois University ("SIU"), was vacated, but summary judgment was entered in favor of those two schools on the grounds of mootness. The Seventh Circuit affirmed, but on the grounds of laches as to all five schools. 710 F.2d 351 (7th Cir. 1983). Cannon's petition for a rehearing was denied, and she did not seek a writ of certiorari.

Cannon filed this suit on September 18, 1984, joining all seven schools as defendants. The material facts in the com-

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[3] The case was reassigned to this Court after Judge Hoffman retired.

plaint are the same as those in the earlier cases: she challenges her rejections as being sex discrimination because of the age criteria. Cannon's legal theories now differ somewhat. The complaint contains two "counts," which both allege contract theories. Count I alleges that when Cannon applied to each of the schools and filed her application fee, she had contracted with them that they would consider her application according to their written policies, unless those policies violated public policy. Each defendant allegedly breached the contract by relying on the age criteria, which violated public policy.

Count II rests on a third-party beneficiary theory. Allegedly, when the federal government gave money to each school, each school agreed to comply with Title IX. Applicants for admission, including Cannon, were allegedly third party beneficiaries of this "contract." Each school breached its contract with the government when it allegedly violated Title IX in denying Cannon admission.

Cannon seeks injunctive relief and damages. The defendants have moved to dismiss, raising the defense of *res judicata.*

II.

Before addressing the *res judicata* issue, we briefly discuss a threshold question concerning the Court's subject matter jurisdiction. Although neither side questioned our jurisdiction, it is of course proper, indeed required, that the Court raise any questions going to our jurisdiction over the case.

It appears that the well-pleaded complaint states two state law claims for breach of contract. While the causes of action are apparently grounded in state law,[4] the contract theories will inevitably depend on an interpretation of federal law, that is, whether "public policy," as expressed in Title IX, was of-

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[4] Conceivably, the third-party beneficiary claim is grounded in a federal common law of contract, since the government was a "party" to the alleged contract, with significant interests at stake. *Cf.* United

*(Footnote continued on the following page)*

fended by Cannon's rejection. Cannon alleges in her complaint that the suit "arises under" Title IX, thus giving this Court jurisdiction under 28 U.S.C. § 1331. [5] Our threshold question, then, is whether Cannon's contract claims do in fact "arise under" Title IX. This question is not simple, since the doctrine interpreting the meaning of "arising under" is a quagmire, to say the least. *See generally* 13B C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure,* § 3562 (1984).

Because state law creates Cannon's causes of action, her complaint fails Justice Holmes' threshold test that "a suit arises under the law that creates the cause of action." *American Well Works Co. v. Layne & Bowler Co.,* 241 U.S. 257, 260, 36 S.Ct. 585, 586 (1916). But Justice Holmes' test defines cases which clearly fall within federal jurisdiction, it does not necessarily describe which cases are outside. *See, e.g., Franchise Tax Bd. v. Construction Laborers,* ___U.S. ___,103 S.Ct. 2841, 2846 (1983). A case may "arise under" federal law where the well-pleaded complaint reveals that the "vindication of a right under state law necessarily turn[s] on some construction of federal law." *Id.* at ___, 103 S.Ct. at 2846, *citing Smith v. Kansas City Title & Trust Co.,* 255 U.S. 180, 41 S.C. 243 (1921); *see also T. B. Harms Co. v. Eliscu,* 339 F.2d 823, 827 (2d Cir. 1964). Cannon's complaint appears

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4 *(Continued)*

States v. Little Lake Misere Land Co., Inc., 412 U.S. 580, 591-94, 93 S.Ct. 2389, 2396-98 (1973); Clearfield Trust Co. v. United States, 318 U.S. 363, 63 S.Ct. 573 (1943). This consideration is not relevant in light of our decision below not to decide the jurisdictional issue finally.

[5] Cannon also alleges jurisdiction under 28 U.S.C. §§ 1343(4), 2201 and 2202. These additional statutes do not change the focus of the analysis below. With the elimination of the amount in controversy requirement from § 1331, § 1343(4) essentially overlaps that section. Sections 2201 and 2202, the Declaratory Judgment Act, are procedural only. It expands the range of remedies without extending jurisdiction. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 70 S.Ct. 876, 879 (1950).

to satisfy this "pivotal federal question" test, since her right to relief would necessarily turn on a construction of Title IX, and perhaps other federal policies.

However, it is not enough to allege a "federal question." A plaintiff must allege a "substantial" federal question in order to invoke the court's subject matter jurisdiction. *See, e.g., Molina-Crespo v. Califano,* 583 F.2d 572, 573-74 (1st Cir. 1978); Wright, Miller and Cooper, § 3564 at 66. To be insubstantial, a federal claim must be "obviously without merit" or clearly foreclosed by prior Supreme Court precedent, "leaving no room for the inference that the question sought to be raised can be the subject of controversy." *Hagans v. Lavine,* 415 U.S. 528, 536-37, 94 S.Ct. 1372, 1379 (1974) (quotations omitted); Wright, Miller & Cooper, § 3564 at 67-70. This test for dismissal is rigorous; if the claim is at all plausible, jurisdiction exists. *See* Wright, Miller & Cooper, *supra* at 70-71.

The "federal question" in this case, like that in Cannon's earlier suits, appears to be whether defendants' conduct violated Title IX. The Seventh Circuit has already squarely held that it did not. 648 F.2d at 1106-09. In so holding, the Court drew upon Supreme Court precedent that interpretation of Title IX depends upon interpretation of Title VI, and that the latter statute reaches only claims of intentional discrimination. The Court concluded that the Supreme Court would hold that Title IX as well does not reach intentional discrimination. *Id.* at 1109. In this suit, as in the earlier one, Cannon has alleged only an unintentional violation of Title IX. Therefore, an argument can be made that her claim is either wholly meritless or clearly foreclosed by controlling law.

However, we do not finally resolve this jurisdictional question. Because the Supreme Court has not ruled directly on the Title IX issue, and because the "insubstantiality" test is very rigorous, we are reluctant to hold, *sua sponte,* that we lack jurisdiction. But in light of our holding below that the case is *res judicata,* we need not ask the parties to brief the

jurisdictional issue.

III.

The doctrine of *res judicata,* or "claim preclusion," has three elements. The defendants must show that (1) the parties to this suit are the same or in privity with those to the earlier suit; (2) this suit alleges the same cause of action as the earlier suit did; (3) a court of competent jurisdiction entered a valid final judgment on the merits in the earlier suit. *See, e.g., Federated Dept. Stores v. Moitie,* 452 U.S. 394, 398, 101 S.Ct. 2424, 2428 (1981); *Mandarino v. Pollard,* 718 F.2d 845, 849 (7th Cir. 1983), *cert. denied,* 105 S.Ct. 116 (1984). The parties agree that the first two requirements are met. The parties to this suit are obviously identical to those in the earlier suits. Moreover, the present complaint is based on identical facts as the earlier one. While the theories of relief differ slightly, that does not matter for *res judicata* purposes, since Cannon could have alleged the contract theories in the earlier suit. *See, e.g. Mandarino,* 718 F.2d at 849-50. The only dispute is whether the judgments operated as adjudications on the merits.

Fed.R.Civ.P. 41(b) provides the starting point for that analysis:

> Unless the court in its order of dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

It is clear from this Rule that a case need not go to full trial to be "on the merits" and thus have preclusive effect. But we cannot simply conclude from the Rule that the Rule 12(b)(6) dismissals in the earlier cases were necessarily "on the merits." Mere reliance on the literal language of Rule 41(b) is improper; the Rule's list of adjudications that are not on the merits is not exclusive. *See Rinehart v. Locke,* 454 F.2d 313, 314-15 (7th Cir. 1971). General preclusion prin-

ciples should control our analysis. *Id.* These principles dictate that in general a dismissal for failure to state a claim under Rule 12(b)(6) operates as an adjudication "on the merits," even though only the pleadings have been examined in dismissing the case. *See Federated Dept. Stores,* 452 U.S. at 399 n.3, 101 S.Ct. at 2428; *Bell v. Hood,* 327 U.S. 678, 681-82; 66 S.Ct. 773, 775-76 (1946); *Mandarino,* 718 F.2d at 849 (state court judgment on pleadings is preclusive); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure,* § 4439 (1981) at 354-62. While courts used to distinguish dismissals for defective pleading from dismissals which go to the merits of a well-pleaded complaint, *see* Wright, Miller & Cooper at 354-57, that distinction generally has been discarded in light of modern rules which allow liberal amendments in the first suit. *Id.* at 357-58.

These standards lead us to hold that Cannon's original suits against Chicago and Northwestern preclude her attempt to sue those parties in this case. That case was dismissed because she had not and could not allege intentional discrimination under Title IX. The dismissal for failure to state a claim was affirmed, and post-judgment relief was denied. She cannot successfully dress the same cause of action in contract clothing in this suit.[6]

Cannon's main argument rests on a clever, but meritless, syllogism. Jurisdiction in the earlier suit was based on 28 U.S.C. § 1343(4), which states in part that federal courts have jurisdiction "of any civil action authorized by law . . . [t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights." Cannon contends that because the earlier suit was dismissed for failure to state a claim under Title IX, it was

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[6] Even if *res judicata* did not apply, it is likely that collateral estoppel, or "issue preclusion," would prevent Cannon from relitigating the question whether defendants' conduct violated Title IX. We need not reach this question, however.

no longer a "civil action authorized by law," thereby depriving the court of jurisdiction under § 1343(4). Thus, concludes Cannon, the dismissal in the earlier suit was for lack of jurisdiction and not entitled to preclusive effect. This argument is flawed. Its logic converts every dismissal for failure to state a claim under federal civil rights law into a dismissal for lack of jurisdiction. It converts many motions under Rule 12(b)(6) into ones under Rule 12(b)(1). Finally, it ignores Supreme Court statements that dismissals for failure to state a federal claim are not jurisdictional and are preclusive. *Federated Dept. Stores,* 452 U.S. at 399 n.3, 101 S.Ct. at 2428; *Bell v. Hood,* 327 U.S. at 681-82; 66 S.Ct. at 775-76. *Costello v. United States,* 365 U.S. 265, 285-86, 81 S.Ct. 534-544-46 (1960), relied upon by Cannon does not suggest a contrary result. At most, *Costello* holds that a dismissal based on a plaintiff's "failure to comply with a precondition requisite to the Court's going forward to . . . the merits" may not be preclusive under Rule 41(b). Cannon's earlier suits involved no issue about her compliance with "preconditions." Thus, *Costello* is irrelevant here, and certainly does not weaken the force of the general rule that a Rule 12(b)(6) dismissal is "on the merits."

Similarly, the previous dismissal of the remaining parties precludes Cannon's attempt to sue them in this case. As noted earlier, the Seventh Circuit ultimately premised the dismissal on laches as to all parties. An appellate decision may have preclusive effect, even if resting on different grounds than the lower court decision. 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice,* ¶ 0.416[2] (1984) at 518. Dismissals based on laches or the running of a statute of limitations preclude a second action based on the same claim brought in the same system of courts. *McCrocklin v. Fowler,* 285 F.Supp. 41 (E.D. Wis. 1968) (laches), *aff'd on opinion below,* 411 F.2d 580 (7th Cir. 1969); *see also Ellingson v. Burlington Northern, Inc.,* 653 F.2d 1327, 1330-31 n.3 (9th Cir. 1981) (limitations); *Myers v. Bull,* 599 F.2d 863, 865 (8th Cir. 1979) (per

curiam) (limitations), *cert. denied,* 444 U.S. 901 (1979); *Mathis v. Laird,* 457 F.2d 926, 927 (5th Cir. 1972) (per curiam) (limitations), *cert. denied,* 409 U.S. 871 (1972); Wright, Miller & Cooper, § 4441 at 366. Although the present claim is based on a contract theory, with possibly different limitations or laches considerations, it is the same "claim" as the previous one for *res judicata* purposes, and is therefore precluded. *See Nilsen v. City of Moss Point,* 674 F.2d 379, 383 n.5 (5th Cir. 1982), *rev'd on other grounds,* 701 F.2d 556 (5th Cir. 1983) (en banc); *Cemer v. Marathon Oil Co.,* 583 F.2d 830, 832 (6th Cir. 1978) (dismissal of employment discrimination claim under short federal time limits precludes later "timely" contract action based on same facts).

In sum, we hold that the doctrine of *res judicata* prevents Cannon from bringing this lawsuit. We have examined Cannon's remaining arguments to the contrary and find that they lack merit.

## IV.

The defendants argue that they are entitled to costs and fees incurred in dismissing this complaint, because the complaint was filed in violation of Fed.R.Civ.P. 11. That Rule states:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated . . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extention, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the

> attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper including a reasonable attorney's fee.

The defendants assert that the complaint was obviously barred by *res judicata*, and that its filing was frivolous and vexatious. They also point to the history of the original suits against Chicago and Northwestern as indications that Cannon's counsel knew this suit was frivolous. Following the Seventh Circuit's affirmance of Judge Hoffman's dismissal, the Court denied Cannon leave to amend her complaint or to petition the district court for leave to amend. The Supreme Court then denied her petitions for writs of mandamus and certiorari. 454 U.S. 811 (1981) (mandamus); 454 U.S. 1128 (1981) (certiorari). Back in the district court, Judge Hoffman denied another motion for leave to amend. Cannon went up the appellate ladder again, lost and then moved this Court for relief under Rule 60. We denied the motion. Finally, she filed this suit over a year later.

Attorneys are expected, even required, to represent their clients' interests zealously. But they are also expected to know when to give up on an obviously lost cause. It should have been apparent to Cannon's counsel that Cannon's cause was dead. It should also have been apparent to him that bringing another action on the same facts would be barred by *res judicata*, collateral estoppel or both. We think that upon "reasonable inquiry," counsel would have found that this suit was not "warranted by existing law." Accordingly, we hold under Rule 11 that Cannon's counsel shall pay defendants' costs and attorney's fees incurred from litigating this motion to dismiss. Imposing these sanctions on counsel only is proper under the Rule. *See* Fed.R.Civ.P. 11 (Advisory Committee Notes). Defendants may file a petition for reasonable costs

and fees on or before March 1, 1985. Cannon's counsel may respond on or before March 20, 1985. His response may include an argument that sanctions should not be imposed at all. We give him leave to do so because he did not previously respond to defendants' Rule 11 arguments, even though he submitted two briefs in which he could have done so. Defendants may reply if they so choose on or before April 1, 1985.

V.

Defendants' motions to dismiss are granted. They are further entitled to costs and fees. It is so ordered.

MARVIN E. ASPEN
MARVIN E. ASPEN
United States District Judge

DATED 2/26/85

In the

# United States Court of Appeals

## For the Seventh Circuit

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No. 82-2239

GERALDINE G. CANNON,

*Plaintiff-Appellant,*

*v.*

UNIVERSITY OF HEALTH SCIENCES/THE CHICAGO MEDICAL SCHOOL, *et al.*,

*Defendants-Appellees.*

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Nos. 82-2297 and 82-2298

GERALDINE G. CANNON,

*Plaintiff-Appellant-Cross-Appellee,*

*v.*

SOUTHERN ILLINOIS UNIVERSITY and BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS,

*Defendants-Appellees-Cross-Appellants.*

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Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79 C 5009—**Edwin A. Robson**, *Senior District Judge.*

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ARGUED FEBRUARY 17, 1983—DECIDED JUNE 14, 1983

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Before PELL and ESCHBACH, *Circuit Judges*, and VAN PELT, *Senior District Judge.**

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* Robert Van Pelt, Senior District Judge for the District of Nebraska, is sitting by designation.

PELL, *Circuit Judge.* The plaintiff-appellant, Geraldine Cannon, appeals from the district court's grant of summary judgment in favor of five medical schools and the individual admissions representatives thereof. Cannon alleges that the medical schools violated her civil rights by discriminating against her application on the basis of age and sex. The district court granted summary judgment as to three of the defendants, University of Health Sciences/The Chicago Medical School (Chicago Medical), Loyola University of Chicago (Loyola), and Rush-Presbyterian-St. Luke's Medical Center (Rush), on the ground of laches. The summary judgments granted the remaining two defendants, Southern Illinois University (SIU) and the Board of Trustees of the University of Illinois (Illinois), were on the ground of mootness.

The primary issue on appeal is whether laches precludes Cannon's claims against all five defendants. Two related questions are: (1) whether the defendants are immune from all damage claims; and (2) whether SIU and Illinois can rely on laches as a defense to Cannon's claim pursuant to 42 U.S.C. § 1983.

## I. FACTS

### *A. General Background*

In the fall of 1974, Cannon applied for admission to the 1975 entering class at every medical school in the state of Illinois. Cannon had been a surgical nurse for over thirty years. She was completing her baccalaureate degree at the time she filed the medical school applications. All of the medical schools, including the five named as defendants in this suit, denied Cannon admission.[1] Her academic qualifications, including her college grade point average and her score on the Medical College Ad-

[1] Cannon reapplied to Illinois the following year. Her reapplication was denied in March, 1976.

mission Test (MCAT), were competitive with students who were admitted to the medical schools.[2]

In the summer of 1975, Cannon filed suit against two of the medical schools that had denied her admission, the University of Chicago (Chicago) and Northwestern University (Northwestern). She alleged, *inter alia*, sex discrimination in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (Title IX). Specifically, Cannon claimed that her application was denied pursuant to a published admissions policy that discouraged applicants over thirty years of age. She asserted that this policy had an adverse impact on women and failed validly to predict success either in medical school or in practice. In 1979, the Supreme Court, reversing the opinion of this court, held that Title IX provided a private right of action. *Cannon v. University of Chicago*, 441 U.S. 677 (1979) (reversing and remanding 559 F.2d 1063 (7th Cir. 1977)). The remand was limited to consideration of the Title IX claim. The district court again dismissed for failure to allege purposeful discrimination. This holding was affirmed by this court, 648 F.2d 1104 (7th Cir. 1981), *cert. denied*, 103 S. Ct. 1254 (1983).

In late 1975, Congress passed the Age Discrimination Act of 1975, Pub. L. No. 94-135, 89 Stat. 728 (codified at 42 U.S.C. §§ 6101-6107) (Age Act). The date on which the Age Act took effect was deferred until the Department of Health, Education & Welfare (HEW) promulgated interpretative regulations in 1979. *See* 42 U.S.C. § 6102. These regulations specified that age could not be considered by medical schools in making admission decisions. 45 C.F.R. Part 90 (1979). Since the issuance of the regulations, age has not been a factor in the admissions decisions of the defendant medical schools.

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[2] Cannon asserts that her combined grade point average and MCAT score gave her approximately a seventy percent chance of admission to medical school.

Two aspects of the medical school admission process are relevant to this appeal. First, in 1977, the MCAT was revised. The sections of the prior MCAT that tested verbal skills and general information were eliminated. The new test was designed to measure more accurately an applicant's problem solving abilities, scientific knowledge, and reasoning skills. All students applying for entrance to medical school in 1980 and subsequent years have been required to submit a score from the "new" MCAT.[3] Second, at all pertinent times the defendant medical schools have had a policy of reconsidering applicants for admission only if a new application was filed each year for which reconsideration was sought. This policy was implemented to avoid the accumulation of denied applications. Such a procedure was deemed necessary because of the large volume of annual applications.

*B. Administrative Remedies*

In 1975, the same year Cannon filed suit against Chicago and Northwestern, the Department of Labor notified Rush that Cannon had advised the Department of her intent to sue Rush for a violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(c). Also in 1975, Cannon filed an administrative complaint against SIU with the Office of Civil Rights.

In 1976, Cannon instituted a complaint against Rush with the Office of Civil Rights. The agency obtained data from Rush regarding the admission process applicable to the 1975 entering class. Between 1976 and 1979, there was apparently no communication between any administrative agency and any of the defendants.

In 1979, Cannon filed a revised discrimination complaint with the Office of Civil Rights against SIU and

[3] Apparently, the medical schools accepted scores from either the "old" or "new" MCAT for persons seeking to enter medical school in 1978 and 1979.

Rush. The schools supplied the requested data. The charge was then referred to Washington for a policy consideration.

*C. Prior Judicial Proceedings on Present Suit*

On November 29, 1979, Cannon commenced this action. She had been rejected by each school between three years, eight months and nearly five years earlier. Cannon alleged violations of the Equal Protection Clause and of Illinois law. She also sought declaratory and injunctive relief, as well as damages, under both Title IX and the Age Act. Cannon subsequently amended her complaint to add a claim against Illinois and SIU, both state universities, pursuant to 42 U.S.C. § 1983. The Section 1983 claim sought both damages and injunctive relief. The statute of limitations applicable to the claim for damages pursuant to 42 U.S.C. § 1983 had not run at the time this claim was added to Cannon's complaint.

On October 13, 1981, the district court held that all claims for damages under Title IX were foreclosed by this court's holding in *Lieberman v. University of Chicago*, 660 F.2d 1185 (7th Cir. 1981), *cert. denied*, 456 U.S. 937 (1982). Judge Robson also ruled that Cannon could not rely on the Age Act because the alleged discrimination occurred before the Act was passed by Congress and long before its July 1, 1979, effective date. Finally, the district judge granted summary judgment in favor of SIU, Illinois, Rush, and Loyola on the grounds of laches.[4] Judge Robson found the delay between the discriminatory acts and the filing of this suit to be unreasonable. He also found that the admissions criteria of the defendant medical schools had changed significantly since Cannon's 1974 application, particularly in light of the 1977 revision of the MCAT, and that requiring the schools to evaluate Cannon's candidacy on the basis of her

[4] Chicago Medical had not joined in the other defendants' motion for summary judgment on the basis of laches.

1974 applications would be prejudicial to both the autonomy of the medical schools' admission processes and those applicants who applied, submitted a new MCAT score, and met the admissions criteria in each ensuing year.

On June 15, 1982, Judge Robson issued a second memorandum opinion and order. He granted Chicago Medical's motion for summary judgment on the ground of laches, relying on the same analysis articulated in the October 13, 1981 memorandum opinion as to the other four defendants. Judge Robson reconsidered whether Illinois and SIU could rely on laches in defense of Cannon's Section 1983 claim. He held that the Eleventh Amendment foreclosed any damage claim against the state universities but that the statute of limitations applicable to a Section 1983 damage claim nevertheless governed the claims for equitable relief pursuant to Section 1983. Judge Robson therefore vacated his October 13, 1981 ruling that laches barred the Section 1983 claims against SIU and Illinois.

Finally, Judge Robson considered whether the Section 1983 requests for injunctive and declaratory relief were moot. He held that they were, reasoning that the effect of the Age Act and the regulations thereunder was the complete termination by the defendants of their age-preference policies. Judge Robson noted that Cannon could obtain the same result as an injunction would ensure if she simply reapplied to the medical schools. The court therefore granted summary judgment for SIU and Illinois on the ground of mootness.

Cannon has appealed from the two orders granting summary judgment. On appeal, Cannon urges:

(1) that her claims are not moot because the effect of the alleged violation has not been eradicated by interim relief or events;

(2) that the doctrine of laches does not bar any of her claims because the delay was reasonable and the defendants were not prejudiced in the conduct of their defense;

(3) that damages are available under Title IX and against Illinois and SIU pursuant to 42 U.S.C. § 1983.

On cross-appeal, SIU and Illinois assert that laches controls Cannon's Section 1983 claim against them because they are immune from any damage claim and the Section 1983 action is therefore purely equitable.

In light of our disposition of this appeal, we need not address the question of mootness.

## II. AVAILABILITY OF DAMAGES

We first address whether the district court correctly held that Title IX precludes any claim for damages. We then turn to whether the district court erred in holding that Illinois and SIU, as well as the individually named representatives of those two medical schools, were immune from any claim for damages under 42 U.S.C. § 1983 because of the Eleventh Amendment.

### *A. Availability of Damages under Title IX*

In *Lieberman v. University of Chicago*, 660 F.2d 1185 (7th Cir. 1981), *cert. denied*, 456 U.S. 937 (1982), this court was presented with the question whether damages are an available remedy under Title IX. Noting the availability of other remedies, including attorneys' fees, *see* 42 U.S.C. § 1988, injunctive relief under Title IX, and federal administrative action, *see* 20 U.S.C. § 1682, and this court's perception that a damage remedy was not entirely consistent with the legislative purpose of Title IX, the *Lieberman* court held that damages were not an available remedy. 660 F.2d at 1188. Because of that holding, the court expressly declined to consider the appellees' argument that Lieberman had failed to mitigate her damages. *Id.* at 1188 n.10.

Cannon seeks to distinguish her case from *Lieberman* on the basis that the failure to mitigate damages, present in *Lieberman*, is absent here. That argument is unpersuasive as a basis for distinction in light of the *Lieberman*

court's having expressly declined the opportunity to rely on the asserted failure to mitigate. Cannon's other argument in support of her assertion that damages are available under Title IX is premised on a Second Circuit case in which the issue was the availability of damages under Title IV. *See Guardians Association of the New York City Police Department, Inc. v. Civil Service Commission*, 633 F.2d 232 (2d Cir. 1981), *cert. granted*, 454 U.S. 1140 (1982). In light of the clear holding of *Lieberman*, a case that we decline to reconsider, Cannon's reliance on the analogy to Title IV is misplaced.

The district judge was correct in holding that *Lieberman* precludes any claim for damages based on Title IX.

*B. Eleventh Amendment Immunity*

The district court held that Cannon's damage claims against SIU and Illinois, pursuant to 42 U.S.C. § 1983, were barred by the Eleventh Amendment. The Eleventh Amendment acts as a jurisdictional bar to suit against a state in federal court, absent the state's consent to the suit.[5] *Edelman v. Jordan*, 415 U.S. 651, 678 (1974).

Cannon urges that the district court erred because: (1) her claims are against individual representatives of the two schools as well as the schools themselves; (2) no judgment against the schools or their representatives would result in a claim against the state treasury; and (3) even though Illinois and SIU are subject to control by the State, they are not the State itself for purposes of the Eleventh Amendment.

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[5] Cannon does not argue on appeal that the State consented to suit. The only possible basis of consent would be the statutory provision authorizing the University of Illinois to "sue and be sued." Ill. Rev. Stat. ch. 144, § 22 (1979). We concur with those courts holding that such a statutory provision does not constitute "consent." *Hamilton Mfg. Co. v. Trustees of State Colleges*, 356 F.2d 599, 601-02 (10th Cir. 1966); *Love v. University of Illinois*, 76 C 954 (N.D. Ill. Feb. 7, 1978).

SIU and Illinois are recognized as state agencies under Illinois law. *Elliott v. University of Illinois*, 365 Ill. 338, 6 N.E.2d 647 (1936); Ill. Rev. Stat. ch. 27, § 132.3a (1977). The powers and duties of the Boards of Trustees are governed by chapter 144 of the Illinois Revised Statutes. The court below, as well as the district court in *Love v. University of Illinois*, 76 C 954 (N.D. Ill. Feb. 7, 1978), relied upon these factors in concluding that the state universities are immune to any claim for damages by reason of the Eleventh Amendment. Their result is consistent with that reached by the Tenth Circuit in *Brennan v. University of Kansas*, 451 F.2d 1287, 1290 (10th Cir. 1971) (relying on Kansas law).

The Eleventh Amendment is applicable even though Cannon has attempted to name individual representatives of the universities, as well as the institutions themselves, as defendants. Cannon's complaint refers only to "John Doe" and "Mary Roe." Even if discovery resulted in Cannon's identifying the individuals and if amending the complaint was held to be consistent with Rule 15(c)(2), Fed. R. Civ. P. 15(c)(2),[6] the Eleventh Amendment still bars the claims for damages.

In *Edelman v. Jordan*, 415 U.S. 651 (1974), the Court held that the Eleventh Amendment bars a suit "by private parties seeking to impose a liability which must be paid from public funds in the state treasury." *Id.* at 663. Relying on *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945), the *Edelman* Court reasoned that if the damage award is to be paid by the State, the State is the real party in interest even though individual officials might be named as nominal defendants. 415 U.S. at 663. In this case, because the state universities are the alter ego of the State, any damage award chargeable

[6] Illinois and SIU urge that such amendment would not be permissible because the statute of limitations has run. *See Wood v. Worachek*, 618 F.2d 1225, 1230 (7th Cir. 1980). We need not decide this question because of our disposition regarding the Eleventh Amendment immunity issue.

to university assets is an award against the State itself. No authority supports Cannon's argument that this analysis is altered by the possibility that a damage award would be met through insurance proceeds or from federal funds. If Cannon's suit would result in a damage award payable by the universities, it is barred by the Eleventh Amendment.

Cannon's allegations pertain to the enforcement, by university authorities, of university policies that allegedly condoned discrimination on the basis of age with a resulting disparate impact on women. Recovery is sought from the institutions, not the individuals. As the Supreme Court observed in *Edelman*, it is a "virtual certainty [that any damage award will] be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action." 415 U.S. at 668. The district judge correctly held, therefore, that Cannon could not recover damages from Illinois or SIU pursuant to her Section 1983 claim.

## III. AVAILABILITY OF LACHES TO SIU AND ILLINOIS

We next turn to the question raised by the cross-appeal: whether SIU and Illinois can rely upon a defense of laches to Cannon's claim under 42 U.S.C. § 1983.[7] In his order of June 15, 1982, Judge Robson held that SIU and Illinois could not assert a defense of laches. The applicable statute of limitations did not bar the claim. The judge stated that because Section 1983 provides for both legal and equitable remedies, the state statute of limitations applicable to a claim for damages under Section 1983 also controls the equitable aspect of the claim. In support, Judge Robson relied primarily on *Cope v.*

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[7] Cross-appeal was the procedure utilized to present to this Court the laches claim although presumably it could have been advanced as an alternative basis for affirming the district court's grant of summary judgment in favor of Illinois and SIU against Cannon.

*Anderson*, 331 U.S. 461 (1947), and *Russell v. Todd*, 309 U.S. 280 (1940).

The question whether laches governs a Section 1983 action in which legal relief is foreclosed by the Eleventh Amendment bar is a question of first impression in this court. We are also unaware of any precedent in other courts addressing this precise issue. We begin with an analysis of the two Supreme Court cases upon which Judge Robson principally relied.

Putting aside for the moment the impact of the Eleventh Amendment, it is important to recognize that both *Russell* and *Cope* state only that, in cases of concurrent jurisdiction, the doctrine of laches cannot be applied so as to permit relief when the statute of limitations applicable to the analogous legal claim has run. *Russell v. Todd*, 309 U.S. 280, 289 (1940) ("when the jurisdiction of the federal court is concurrent with that at law, or the suit is brought in aid of a legal right, *equity will withhold its remedy if the legal right is barred by the local statute of limitations*" (emphasis added)); *Cope v. Anderson*, 331 U.S. 461, 464 (1947) ("[a]nd equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy"). *Accord*, *Nilsen v. City of Moss Point*, 674 F.2d 379 (5th Cir. 1982), *reheard en banc*, 701 F.2d 556 (5th Cir. 1983).[8] The Supreme Court's concern therefore

[8] Cannon urges that any reliance whatsoever on the *Nilsen* case is misplaced. We disagree with Cannon's argument that the panel's interpretation of *Cope* and *Russell* is dictum. The panel's interpretation of those two cases was an essential step in reaching the holding that the plaintiff was not collaterally estopped from litigating whether the equitable portion of her Section 1983 claim was barred by laches. Similarly, we reject Cannon's contention that the Fifth Circuit panel's analysis of the two Supreme Court cases is in conflict with other circuits. The panel opinion carefully distinguishes those cases that Cannon now urges as in conflict with the Fifth Circuit panel opinion. *See* 674 F.2d at 387.

(Footnote continued on following page)

was that laches not be used to *extend* the applicable time limit in a case of concurrent jurisdiction. Neither *Cope* nor *Russell* forecloses the argument that laches may *shorten* the applicable time limit and, therefore, neither *Cope* nor *Russell* precludes reliance by SIU and Illinois on laches in the instant case.

Similarly, the relevant precedent in this circuit does not foreclose the applicability of laches to the present case. In *Morgan v. Koch*, 419 F.2d 993 (7th Cir. 1969), the plaintiff had abandoned her equitable claims for rescission and sought only damages in a securities fraud case. The district court had granted the defendants' motion to dismiss on the basis of laches. On appeal, this court held that when a litigant seeks to enforce federal and state rights in law only, the statute of limitations controls. *Id.* at 996. In dictum, the court stated that, under *Cope* and *Russell*, the doctrine of laches would be inapplicable even if the plaintiff Morgan "were still alternatively seeking equitable relief." *Id.* Nonetheless, the decision of the district court was affirmed because the statute of limitations had run and the court held that Morgan's lack of diligence failed to warrant tolling of the statute.

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[6] *continued*

We do note, however, that *Nilsen* was reheard *en banc*. *Nilsen v. City of Moss Point*, 701 F.2d 556 (5th Cir. 1983). The court, *en banc*, held that res judicata barred consideration of the action based on Section 1983. In footnote, the court expressly stated that, in light of its disposition of the appeal, it need not consider the question of laches. *Id.* at 564 n.8. Nothing in the *en banc* opinion suggests that the Fifth Circuit disagreed with the panel's interpretation of *Cope* and *Russell* as addressing only the situation in which laches is urged as a means of *extending* the time period in which an action can be brought. Pursuant to Circuit Rule 17 of the Fifth Circuit, the panel opinion in *Nilsen* was vacated upon the granting of the rehearing *en banc*. This does not preclude our recognizing, however, a reasoned interpretation of the Fifth Circuit panel, particularly in light of the fact that our analysis of *Cope* and *Russell* is dictated by the language of those cases and, although in accord with that of the *Nilsen* panel, in no way depends upon the result reached in *Nilsen*.

In *Baker v. F & F Investment*, 420 F.2d 1191 (7th Cir. 1970), the plaintiffs sought damages as well as equitable relief pursuant to 42 U.S.C. § 1982. The district court held, *inter alia*, that the applicable statute of limitations precluded recovery by some members of the plaintiff class. On appeal, the plaintiffs urged that laches rather than the statute of limitations governed. The court rejected that argument, relying on *Morgan*. 420 F.2d at 1193.

The holdings of *Morgan* and *Baker* do not foreclose reliance on laches in the present case. *Morgan* supports the familiar rule that laches do not apply to an action seeking purely legal relief. The result in *Baker* is no broader than that dictated by *Cope* and *Russell*: laches cannot be relied upon so as to permit equitable relief when the statute of limitations on the analogous legal claim bars recovery.

Even if one read the dictum in *Morgan* as controlling, which we decline to do, a claim of laches in the present case is not barred. Although Cannon seeks both legal and equitable relief under Section 1983, any claim to damages is not cognizable, and it legally was not from the inception of the litigation because of the Eleventh Amendment doctrine of sovereign immunity, *see* Section II(B), *supra*. The case is therefore purely equitable in nature. Not even the *Morgan* dictum suggests that a claim of laches is inapplicable in such a situation.

Neither Supreme Court nor Seventh Circuit precedent prohibits application of the doctrine of laches to Cannon's Section 1983 claim against SIU and Illinois. The relevant Supreme Court cases govern only the situation in which laches is urged as a means of gaining relief that would be time-barred under the statute of limitations applicable to the analogous legal claim. The Seventh Circuit cases, even if the *Morgan* dictum is considered, would permit the applicability of laches to a case in which no legal remedy is sought. In this case, the Eleventh Amendment prohibits the district court from entertaining the legal claim. Because the only relief that *can* be sought is equitable, laches should apply.

## IV. APPLICATION OF LACHES

In order for laches to bar Cannon's claims against the five defendants, the defendants must demonstrate: "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello v. United States*, 365 U.S. 265, 282 (1961).[9] In a case such as this, in which there is no dispute as to the material facts, the district court's decision that laches bars the action is subject to review by the abuse of discretion standard. *See EEOC v. Massey-Ferguson, Inc.*, 622 F.2d 271, 276 (7th Cir. 1980).

### *A. Lack of Diligence*

The determination as to whether Cannon demonstrated a lack of diligence in filing this suit turns on whether the delay was both unreasonable and inexcusable. In *EEOC v. Massey-Ferguson, Inc.*, 622 F.2d 271, 276 (7th Cir. 1980), this court upheld the district court's finding that a delay of four years, nine months between the time charges were filed with the agency and the time the complaint was filed was unreasonable. Other cases, involving the EEOC as plaintiff and delays ranging from three years, seven months to four years, ten months, have similarly resulted

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[9] In his Memorandum Order of June 15, 1982, Judge Robson stated: "Although laches is an affirmative defense, the length of the delay can give rise to a rebuttal presumption of laches. *Miller v. United States*, 438 F. Supp. 514, 524 (E.D. Pa. 1977). The burden then shifts to the plaintiff to show that the delay was excusable, or that the defendants were not prejudiced." Despite this statement, the court below gave careful consideration, particularly in the order of October 13, 1981, to the arguments asserting prejudice that were advanced by the defendants. We find little indication that the district court resolved the prejudice question by relying on a presumption. Similarly, in evaluating this aspect of the laches defense on appeal, we do not start with a presumption in favor of the defendants but rather evaluate the arguments raised by the defendants with a view to whether the district court abused its discretion in finding that prejudice was demonstrated.

in a finding that the delay was unreasonable. *See EEOC v. Liberty Loan Corp.*, 584 F.2d 853 (8th Cir. 1978) (delay of four years, four months); *EEOC v. Westinghouse Electric Corp.*, 450 F. Supp. 792 (E.D. Mo. 1978), *aff'd in relevant part*, 592 F.2d 484 (8th Cir. 1979) (delays of three years, seven months to four years, seven months); *EEOC v. American Machine & Foundry, Inc.*, 13 Fair Empl. Prac. Cas. (BNA) 1634 (M.D. Pa. 1976) (delay of four years, ten months). In light of the heavy caseload carried by the EEOC, a burden that has been recognized by the Supreme Court, *see Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 364, 370 (1977), the findings of unreasonable delay in the above-cited cases are particularly significant.

In the instant case, Cannon's delay in filing suit ranged from three years, eight months in the case of Illinois (from the date of her *second* rejection by that medical school) to nearly five years in the case of the other defendants. *Massey-Ferguson* supports the district court's holding that this was an unreasonable time delay. We next consider whether the delay was excusable.

Cannon's primary argument is that she could not file this suit until the question whether Title IX provided a private right of action was resolved in her suit against Chicago and Northwestern. In the patent context, where the issue of other pending litigation is frequently an issue, this court has held that "the existence of other pending litigation over the patent does not automatically excuse delay in the bringing of the suit." *Advanced Hydraulics, Inc. v. Otis Elevator Co.*, 525 F.2d 477, 480 (7th Cir. 1975), *cert. denied*, 423 U.S. 869.

The relief available to Cannon under 42 U.S.C. § 1983 is identical to that available under Title IX. The uncertainty as to whether Title IX provides for a private right of action, prior to the Supreme Court's holding in 1979 that it does so permit, cannot excuse Cannon's delay in filing suit against SIU and Illinois because she could have sought the same relief pursuant to Section 1983. Judge Robson also correctly rejected Cannon's assertion

that she might have been subject to sanctions had she filed the present case under Title IX during the pendency of the appeal in the suit against Chicago and Northwestern. Dismissal of the complaint—and certainly any sanctions against Cannon—would have been inappropriate because the case was against different defendants and alleged causes of action under the Age Act and Section 1983 as well as the Title IX claim. Inclusion of a cause of action based on Title IX could have been justified on the ground that Cannon sought to preserve her rights against these defendants.

Cannon's attempts to secure administrative resolution of her claims similarly does not excuse a delay of this length. Her administrative complaints were filed against SIU and Rush in 1975 and 1976. The lack of any agency action compelled Cannon to file a revised discrimination complaint in 1979. It should have been apparent to Cannon long before November, 1979, when this suit was filed, that no administrative resolution was imminent.

Judge Robson's determination that Cannon's delay in filing this suit was inexcusable is not erroneous. The district court was correct in concluding that a lack of diligence, the first prong of the showing required for laches, was demonstrated. *See Costello v. United States*, 365 U.S. 265, 282 (1961). We next address whether the defendants demonstrated that they were prejudiced by this unreasonable and inexcusable delay.

*B. Prejudice to the Defendants*

Turning to the second prong of the test for laches, Cannon asserts that the prejudice must be to the defendant's ability to conduct his defense. In support, Cannon cites *EEOC v. Massey-Ferguson, Inc.*, 622 F.2d 271, 275 (7th Cir. 1980). The defendants differ with Cannon's narrow reading of the prejudice requirement, relying on language in *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) (quoting *Galliher v. Cadwell*, 145 U.S. 368, 373 (1892)):

> Equity has acted on the principle that "laches is not like limitation, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties."

Although the defendants assert that they are prejudiced by Cannon's delay in filing the instant suit they do not contend on appeal that their ability to defend the action has been diminished. Determining the kind of prejudice that must be demonstrated in the instant action is therefore a critical threshold question.

1. Scope of Prejudice.

The standard articulated in *Massey-Ferguson* is predicated on language in *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355 (1977), in which the Court held that neither Title VII nor state statutes of limitations set an inflexible limit for the EEOC's filing of an action after exhaustion of its conciliation efforts. *Id.* at 366, 370-71. The Court noted that the absence of inflexible time limitations should not prejudice defendants. After enumerating various procedural safeguards, the Court stated:

> It is, of course, possible that despite these procedural protections a defendant in a Title VII enforcement action might still be significantly handicapped in making his defense because of an inordinate EEOC delay in filing the action after exhausting its conciliation efforts. If such cases arise the federal courts do not lack the power to provide relief.

*Id.* at 373. There is no indication, however, in either the *Occidental Life* or the *Massey-Ferguson* opinion that the prejudice standard applicable to laches in a suit filed by a party other than the EEOC need be limited to the defendant's ability to present his defense.

First, the *Occidental Life* opinion did not utilize the term "laches." Instead, the Court referred generally to the power inherent in the federal courts to alleviate any

prejudicial impact resulting from delay by the EEOC. 432 U.S. at 373. Second, the *Occidental Life* Court made no reference to, and certainly no attempt to distinguish, cases such as *Holmberg v. Armbrecht*, 327 U.S. 392 (1946), in which the prejudice prong of the laches defense had been stated more broadly. These factors strongly suggest that both the Supreme Court, in *Occidental Life*, and this court, in *Massey-Ferguson*, were merely articulating the rule appropriate to an action in which the EEOC is the plaintiff and that neither court intended its language to limit the availability of laches in a non-EEOC action.

This conclusion is further supported by the rationale of *Occidental Life*. The Court relied upon the unique circumstances surrounding an EEOC case: the relatively short and well defined time limits governing the plaintiff's filing of his charge with the agency, the sizeable backlog of cases handled by the EEOC, and the on-going notice to a potential defendant once the initial charge is filed with the agency. 432 U.S. at 370, 372-73. These factors together mandated flexible time limits in any case brought by the EEOC. One aspect of that flexibility is that a court's power to grant relief because of the EEOC's delay is limited to the situation in which the defendant's ability to present a defense is curtailed. These factors are absent, however, in a private action and, as a result, there is no basis for so limiting a court's equitable power to grant relief from delay.

The instant appeal is not an action filed by the EEOC, or by any administrative agency. It is a private discrimination suit. Cannon's having sought administrative action against Rush and SIU in 1975 and 1976 does not bring this case within the *Massey-Ferguson* rule. Whatever notice the two defendants might have received from administrative authorities is insignificant in light of the total lack of communication between the Office of Civil Rights and any defendant between 1976 and 1979. The "on-going communication" that characterized an EEOC action in the view of the *Occidental Life* court is completely absent in the present case. The sizeable backlog carried by the EEOC, another factor in which the *Oc-*

*cidental Life*[10] Court relied, is irrelevant to this action filed by Cannon.

In order to prevail on a defense of laches, the defendants in this case must demonstrate some prejudicial "'change in the condition or relations of the . . . parties.'" *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) (quoting *Galliher v. Cadwell*, 145 U.S. 368, 373 (1892)), but need not necessarily demonstrate that they are unable to conduct their defense as a result of the delay.

2. Prejudice Demonstrated by the Defendants.

The prejudice asserted by the defendants is that their admissions standards have changed significantly since Cannon was first rejected. The 1977 revision of the MCAT is largely responsible for the different standards because the new test emphasizes scientific knowledge and problem-solving skills to a greater degree than did the version of the test taken by Cannon. The defendants argue that, as a result, Cannon's position vis à vis other applicants and the defendants has changed. Requiring the defendants to consider Cannon on the basis of her 1974 application would, in their view, impinge upon the defendants' right to select their own students and would operate to the prejudice of other candidates. The defendants also argue that Cannon's admission on the basis of her 1974 application would be detrimental to their policy of requiring annual reapplication by candidates who are not admitted pursuant to their first application to the medical school. The district court held that this uncontroverted showing fulfilled the prejudice prong of the laches defense. We must determine whether the district judge abused his discretion in so holding.

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[10] The circumstances of this case suggest, in fact, that Cannon was not relying on any potential administrative remedy. She filed suit against Northwestern and Chicago prior to or at the same time she first sought administrative action. Further, no administrative complaints were filed against defendants other than Rush and SIU.

The interest of a medical school in selecting its student body is well established. In *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978), Justice Powell stated:

> Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.

On this appeal from a grant of summary judgment, we must assume that, absent enforcement of discriminatory policies by the defendants, Cannon would have been admitted to the defendant medical schools pursuant to the 1974 applications. This does not establish, however, that Cannon would be similarly competitive—or that she would receive an offer of admission—if she took the revised MCAT, reapplied to the medical schools, and was evaluated in comparison with other persons applying in the same year.[11] If Cannon were granted the relief she seeks, she would be admitted to medical school without regard to whether she is qualified in comparison with those students entering medical school at the same time as she. For a court to order such action in an area which so vitally concerns the health and well being of every human being could well be an abuse of the court's equitable power. Because medical school facilities are limited, the result might also be a denial of admission to another candidate more qualified than Cannon. These consequences impinge upon the defendants' right to select student bodies of their own choosing and are particularly serious when the purpose of the selection process is to provide training to those persons best qualified to serve society through the practice of medicine.

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[11] This uncertainty, in fact, appears to be the reason Cannon continues to press for equitable relief in the face of statements by the defendants that she would receive due—and nondiscriminatory—consideration when and if she reapplied.

Cannon's assertion that such prejudice in insufficient in light of the remedy granted in *Bakke* is misplaced. Cannon relies upon the fact that the Supreme Court ordered the Medical School of the University of California at Davis to admit Bakke despite the intervening revision of the MCAT. Cannon's argument overlooks the fact that laches was not asserted in *Bakke* and therefore any prejudice resulting from revision of the MCAT or other changes in the admission process at Davis was not at issue.

The district judge did not abuse his discretion in holding that the defendant medical schools would be prejudiced if they were required to admit Cannon on the basis of her 1974 applications.

## CONCLUSION

It is well established that a grant of summary judgment may be affirmed on any ground that finds support in the record. *Helvering v. Gowran*, 302 U.S. 238, 245-56 (1937); *Miller v. Gateway Transportation Co.*, 616 F.2d 272, 275 n.7 (7th Cir. 1980). Although we do not reach the question whether the district judge was correct in granting Illinois and SIU summary judgment on the ground of mootness, the summary judgment in favor of those defendants is supported by the district judge's findings, in his order of October 13, 1981, that those defendants were prejudiced by Cannon's unreasonable and inexcusable delay in bringing the present action. The determination of the identity of defendants who will have to answer the complaint of a law suit is left to the plaintiff subject only to very general limitations such as presumed good faith. The choice made by Cannon, although she could have named the present defendants in 1975, was to pursue only Chicago and Northwestern. As a result of her belated filing against the defendants named herein, years after her rejections and the institution of the same type of litigation against Chicago and Northwestern, we decline because of the doctrine of laches to rerun the sands of time back nearly a decade to the status of 1974. Consequently,

having considered all arguments urged by Cannon, we hold that the summary judgments granted the defendants on the basis of laches, as well as the district court's holding that Cannon has not asserted any claim for which a legal remedy is available, are affirmed.

AFFIRMED.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

In the

# United States Court of Appeals

## For the Seventh Circuit

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No. 80-1763

GERALDINE G. CANNON,

*Plaintiff-Appellant,*

*v.*

THE UNIVERSITY OF CHICAGO, et al.,
and NORTHWESTERN UNIVERSITY, et al.,

*Defendants-Appellees.*

---

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 75 C 2724—**Julius J. Hoffman**, *Judge.*

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ARGUED SEPTEMBER 24, 1980—DECIDED MAY 6, 1981

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Before PELL, *Circuit Judge*, SKELTON, *Senior Judge*,* and WOOD, *Circuit Judge.*

PELL, *Circuit Judge.* Plaintiff-appellant Geraldine G. Cannon comes before this court for a third time in her effort to gain admission to the defendants' medical schools. She was denied admission for the 1975 academic year and has been involved in litigation over the denials at all levels of the federal judiciary since that time. In her complaints, appellant claimed that the defendants' failure to admit her violated the age and sex discrimination prohibitions of the Fourteenth Amendment to the United States Constitution, the Civil Rights Act of 1871,

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* Senior Judge Byron G. Skelton of the United States Court of Claims is sitting by designation.

42 U.S.C. § 1983, Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, and Illinois law, Ill. Rev. Stat. ch. 48 § 884 *et seq.* The Title IX allegations are the only viable allegations remaining. Initially, the defendants moved to dismiss those allegations pursuant to Fed.R.Civ.P. 12 (b)(6) on the ground that no private right of action existed under Title IX. The district court granted these motions, 406 F.Supp. 1257 (N.D. Ill. 1976), and this court affirmed, 559 F.2d 1063 (7th Cir. 1976). After reviewing the case upon a petition for certiorari, the Supreme Court reversed, holding that a private right of action was implied under Title IX. 441 U.S. 677 (1979). Upon remand to the district court, the defendants filed renewed Rule 12(b)(6) motions to dismiss the complaints, this time on the ground that Title IX prohibits only intentional discrimination and that appellant had failed to allege such purposeful conduct by the defendants in her complaints. Following the denial of appellant's motion for a preliminary injunction which was affirmed by this court, the district court granted defendants' renewed motions to dismiss and denied appellant's cross-motions to strike. Appellant's present appeal is from those orders.

I

The factual background of this case has been set forth in the earlier opinions of the district court and this court. A short repetition, however, may be of some assistance.

The present appellees, Northwestern University Medical School and the Pritzker School of Medicine at The University of Chicago, were two of the ten medical schools to which appellant unsuccessfully applied in 1975. Her undergraduate grade point average (GPA) in science and math related courses was 3.17 of a possible 4.00. The average GPA in these courses of the accepted applicants at the Pritzker School was 3.70 and at least 50% of all applicants to Northwestern had higher GPAs than appellant. On the science portion of the medical college admission test, appellant scored in the lower half of the applicant group to the defendant schools. On the quantitative portion of the test, she scored in the bottom

half of the applicants to Northwestern and in the bottom 20% of the applicants to the University of Chicago.

In 1975, only 110 of over 6700 applicants were accepted at Northwestern while only 104 of 5427 applicants were accepted at Chicago. The Dean of the Pritzker School stated in an affidavit that at least 2000 applicants with better academic qualifications than appellant were rejected. At Northwestern, only seven applicants with lower academic qualifications were admitted: five blacks and two women. During the period from 1971 to 1975, 18.1% of the applicants to the Pritzker school were women while 18.3% of the entering classes were women, and 2.2% of all women applicants were admitted while 2.1% of all male applicants were admitted.

Appellant's suits, which were consolidated in the district court's dismissal, are based upon the admission policies of the defendant schools which in 1975 either discouraged individuals over the age of 30 from applying, or, in the case of Northwestern, prohibited the admission of any applicant over the age of 35 who did not possess an advance academic degree. At the time of her application, appellant was 39 years old and had no such degrees. She asserts that because women historically interrupt their higher education to pursue a family and other domestic responsibilities more often than men, these age policies disparately affected women. Appellant claims that the defendants' age policies therefore resulted in sexual discrimination violative of Title IX.[1]

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[1] Appellant's argument on this issue is somewhat confused. It is clear from the district court's opinion given orally in court that the primary issue before it was the proper standard to be imposed under Title IX; *i.e.*, whether that statute could be violated by disparate impact alone. In her brief to this court, however, appellant maintains that the district court's holding that the constitutional (intentional) standard applied was "premature" because she "propose[d] to meet the constitutional standard" in the district court. Only as a secondary argument here does the appellant assert that a disparate impact alone is sufficient to violate Title IX. We shall approach the problem as did the district court and first address whether the intentional-conduct standard applies under Title IX.

II

Before we proceed to discuss the central issue on this appeal, that is, whether Title IX incorporates an intentional discrimination test or a disparate impact test, we must first address appellant's argument that the Supreme Court decided finally the issue before us now in its previous decision in this case. Appellant asserts that because the Court reversed the prior dismissal of her complaints granted on the ground that she failed to state a claim, the Court implicitly found her complaints to be adequate for the purposes of all further Rule 12(b)(6) motions.

This contention may quickly be dismissed. The only issue before the Supreme Court on the prior appeal in this case was whether Title IX implied a private right of action. The Court did not consider any other potential ground for dismissal of appellant's complaints in its opinion. This was made clear in the opinion of Justice Stevens for the Court:

> Accepting the truth of [appellant's] allegations for the purposes of its decision, the Court of Appeals held that petitioner has no right of action against respondents that may be asserted in the federal court. 559 F.2d 1063. We granted certiorari to review that holding. 438 U.S. 914

*Cannon v. The University of Chicago*, 441 U.S. 677, 680 (1980) (footnote omitted). The fact that the Supreme Court and this court assumed *arguendo* the sufficiency otherwise of appellant's complaints for the purposes of the prior appeal does not disallow the appellees' attack on those assumptions here.

III

Addressing the merits of the district court's opinion, we note that the Supreme Court in *Cannon* indicated that we should look to Title VI for guidance regarding

the proper interpretation of Title IX.[2] 441 U.S. at 694-96. Looking to Title VI, it appears that in the past it has been assumed to apply the disparate impact test. This was the result of the Supreme Court's action in *Lau v. Nichols*, 414 U.S. 563 (1974), upholding certain regulations promulgated by HEW under Title VI. The regulations provided that school systems receiving federal financial assistance "may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination," or have "the effect of defeating or substantially impairing accomplishment of the objectives of the programs as respects individuals of a particular race, color, or national origin." 414 U.S. at 568, *quoting* 45 C.F.R. § 80.3(b)(2). In the opinion by Justice Douglas, the Court noted that the defendant school district had "contractually agreed to 'comply with Title VI of the Civil Rights Act of 1964 . . . and all requirements imposed by or pursuant to the Regulation' of HEW (45 C.F.R. Part 80) which are 'issued pursuant to that title . . .,'" 414 U.S. at 568-69, and concluded that "[w]hatever may be the limits of [the Federal Government's power to fix the terms on which its money allotments to the States shall be disbursed] . . ., they have not been reached here." *Id.* at 569 (citations omitted). The Court therefore reversed a court of appeal's holding that no relief was available under the regulations.

The implication in *Lau* that the disparate impact or effects test applied under Title VI became subject to question by the later language in *Board of Regents v.*

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[2] Title VI, 42 U.S.C. § 2000d, provides:

> No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance.

Title IX, 20 U.S.C. § 1681, provides in part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving Federal financial assistance. . . .

*Bakke*, 438 U.S. 265 (1978). In that case where the Supreme Court invalidated an affirmative action special admissions program at the University of California Medical School, Justice Powell was of the opinion that Title VI should be held to impose the intentional discrimination standard. After discussing the legislative history of Title VI, he concluded:

> In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause of the Fifth Amendment.

438 U.S. at 287. A violation of the Equal Protection clause had previously been held to require a finding of intentional discrimination; disparate impact alone will not support a cause of action under the Constitution. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977); *Washington v. Davis*, 426 U.S. 229, 238-48 (1976).

Though the dissenters in *Bakke* felt that the affirmative action program at the University should have been upheld, the opinion by Justice Brennan joined in by Justices White, Marshall and Blackmun concurred in Justice Powell's statement that the constitutional standard applied under Title VI:

> We agree with Justice Powell that, as applied to the case before us, Title VI goes no further in prohibiting the use of race than the Equal Protection clause of the Fourteenth Amendment itself.

438 U.S. at 325

> In our view, Title VI prohibits only the uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies; . . ."

*Id.* at 328. The dissenters later expressly questioned the continued viability of the *Lau* implications after the *Bakke* decision:

> We recognize that *Lau* when read in light of our subsequent decision in *Washington v. Davis*, 426 U.S. 229 (1976), which rejected the general proposi-

> tion that governmental action is unconstitutional solely because it has a racially disproportionate impact, may be read as being predicated upon the view that, at least in some circumstances, Title VI proscribes conduct which might not be prohibited by the Constitution. Since we are now of the opinion, for the reasons set forth above, that Title VI's standard, applicable alike to public and private recipients of federal funds, is no broader than the Constitution's, we have serious doubts concerning the correctness of what appears to be the premise of that decision.

*Id.* at 352.

In a recent Supreme Court opinion, Justice Marshall, joined by Justice Brennan and Justice Blackmun, concurred and expressed similar sentiments:

> In *Bakke*, five members of the Court were of the view that the prohibitions of Title VI—which outlaw racial discrimination in any program or activity receiving federal financial assistance—are coexistent with the Equal Protection guarantees of the Fourteenth Amendment.

*Fullilove v. Klutznick*, 48 U.S.L.W. 4979, 4998 n.1 (July 2, 1980). Similarly, in *Board of Education v. Harris*, 444 U.S. 130 (1979), the Court clearly indicated that *Lau* is not dispositive of the issue of the standard under Title VI. In that case, the Court held that certain sections of the Emergency School Aid Act (ESAA) incorporated the disparate impact standard for testing illegal racial discrimination. When addressing the Board's argument that because Title VI required intentional discrimination for a violation so should the ESAA, the Court stated:

> There is . . . no need here for the Court to be concerned with the issue whether Title VI of the Civil Rights Act of 1964 incorporates the constitutional standard. See *University of California Regents v. Bakke*, 438 U.S. 265 (1978). Consideration of that issue would be necessary only if there were a

> positive indication either in Title VI or in ESAA that the two Acts were intended to be coextensive.

*Id.* at 149.

* * *

> It does make sense to us that Congress might impose a stricter standard under ESAA than under Title VI of the Civil Rights Act of 1964. A violation of Title VI may result in a cutoff of all federal funds, and it is likely that Congress would wish this drastic result only when the discrimination is intentional. In contrast, only ESAA funds are rendered unavailable when the ESAA violation is found.

*Id.* at 150.

> ESAA was an attempt by Congress to bring about the same remedy without regard to the cause of the problem, while Title VI may have been intended to remedy the problem only when its cause was intentional discrimination.

*Id.* at n. 13.

The dissent in *Board of Education* by Justice Stewart with Justices Powell and Rhenquist joining, also assumed that the *Lau* implication was not good law on this point. The Justices expressed the opinion that the intent standard should apply alike to the ESAA and Title VI. When addressing the majority's argument that the legislative history of § 703 of the ESAA, the so-called Stennis Amendment, indicated that the section was to impose only the disparate-impact test, Justice Stewart stated:

> My difficulty with this reasoning stems from the fact that the Stennis Amendment is applicable not only to ESAA, but also to Title VI of the Civil Rights Act of 1964, and the latter has been construed to contain not a mere disparate-impact standard, but a standard of intentional discrimination. In *University of California Regents v. Bakke*, 438 U.S. 265, five members of the Court concluded that Title VI, which prohibits discrimination in federally funded programs, prohibits only discrimination

> violative of the Fifth Amendment and the Equal Protection Clause of the Fourteenth. *Id.* at 281-287 (Powell, J.); *id.* at 325-355 (Brennan, J., White, Marshall, and Blackmun, J.J.). Those constitutional provisions, in turn, have been construed to reach only purposeful discrimination. *Dayton Board of Education v. Brinkman*, 433 U.S. 406; *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252; *Washington v. Davis*, 426 U.S. 229; *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189. It thus follows from *Bakke* that Title VI prohibits only purposeful discrimination.

*Id.* at 159-60, *and see id.* at 162.

It would seem from the above quoted language that seven of the Justices of the Supreme Court support the view that a violation of Title VI requires intentional discrimination.[3] We agree that this is the better view and other courts are in accord. In *Parents Association of Andrew Jackson High School v. Ambach*, 598 F.2d 705 (2d Cir. 1979), for example, the court noted that at least in school discrimination cases, Title VI should be held to impose the intentional discrimination standard. The court distinguished its earlier opinion in *Board of Education of New York City v. Harris*, 584 F.2d 576 (2d Cir. 1978), *affirmed on other grounds*, 444 U.S. 130 (1979), where it had held that Title VI was violated by disparate impact alone in an employment discrimination context. The court noted that the earlier opinion had relied upon an analogy to Title VII which had been held to impose the disparate impact test, but decided that in the school case, the proper analogy would be to Title IV which by its terms imposed the higher intentional dis-

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[3] The three Justice plurality opinion in *Fullilove v. Klutznick*, 48 U.S.L.W. 4979 (1980), does not alter this conclusion. In *Fullilove*, the Chief Justice cited *Lau* as an example of a broad interpretation of Congress' power to remedy discrimination. The citation does not serve as a reaffirmance of the *Lau* implications at issue here especially since Justice Burger's opinion was joined in by Justices Powell and White who expressed the view in *Bakke* that Title VI imposes the intentional discrimination standard.

crimination standard. 598 F.2d 716, *see* 42 U.S.C. § 2000c-6. The court held, therefore, that the higher standard ought to apply under Title VI in the school discrimination area. In agreement is the detailed opinion in *Bryan v. Knoch*, 492 F.Supp. 212, 229-33 (S.D.N.Y.), *affirmed*, 627 F.2d 612 (2d Cir. 1980), where the court held that the closing of a city hospital must be shown to have been intentionally discriminatory to be a violation of Title VI, *Lora v. Board of Education*, 623 F.2d 248, 250 (2d Cir. 1980), which held that the assignment of handicapped children to special schools must be shown to be intentionally discriminatory to violate Title VI, and *Harris v. White*, 479 F. Supp. 996, 1002 (D. Mass. 1979), which held the intent standard applied to a Title VI challenge to a city's employment practices. *Board of Education* discussed in *Parents' Association* and which relied upon *Lau* in reaching its conclusion that Title VI imposed the disparate impact test in the employment discrimination area, would not seem to aid significantly appellant's position here in light of the Supreme Court's distinguishing Title VI from the ESAA in its affirmance of the case, and the Second Circuit's narrowing of the *Board of Education* holding in *Parents' Association.*

In short, we believe that a majority of the Justices on the Supreme Court as well as other courts that have recently addressed this question in similar circumstances would hold that a violation of Title VI requires an intentional discriminatory act and that disparate impact alone is not sufficient to establish a violation. We shall therefore adopt that standard under Title IX and evaluate appellant's complaint accordingly.

## IV

The complaints appellant filed in these actions contain no express allegations that her applications to the defendants' medical schools were purposefully or intentionally rejected because of her sex. It is clear from the text of her complaints that appellant's cause of action was based solely upon the alleged disparate impact the defendants' age policies had upon women. With regard to the Title IX claims, the complaints allege simply:

A material criterion for defendants' denial of plaintiff's application for admission to the September 1975 entering class at [the defendants'] Medical School[s] was her age which, in the circumstances of application to medical school, is a criterion disproportionately characteristic of her sex and does not validly predict any lack of success in the education program or activity of the school[s]. This conduct on the part of defendants is in violation of the Civil Rights Act of 1964, 42 U.S.C. § 2000c *et seq.*, as amended by Title IX of the Education Amendments of 1972, P. L. 92-318, § 901(a) which provides:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance,"

and the specific regulations promulgated by the Department of Health, Education and Welfare thereunder, 45 C.F.R. § 86.21(b)(2) which provides:

> "A recipient [of Federal financial assistance] shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criterion which do not have such a disproportionately adverse effect are shown to be unavailable."

This claim of disparate impact,[4] even when coupled with the allegations made in appellant's brief to this court that the defendants knew of this impact while enforcing their age policies, is insufficient to establish a violation of Title IX. *Personnel Administrator v. Feeney,*

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[4] It goes without question, of course, and appellant has not contended otherwise, that the regulation can not impose a standard broader than that imposed by this statute.

442 U.S. 256, 279 ("'Distriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences.'") (citation and footnote omitted); *Lora, supra*, at 250 (" . . . 'foreseeable result' . . . standing alone is not sufficient to establish the requisite discriminatory intent . . .," *citing Columbus Board of Ed. v. Penick*, 443 U.S. 449, 462 (1979)). An illegal intent to discriminate cannot be posited solely upon a mere failure to equalize an apparent disparate impact.

Nor do we believe that appellant's allegations under her § 1983 claims that defendants acted "arbitrarily and invidiously . . . in violation of the Fourteenth Amendment" are sufficient. These claims were dismissed by the district court after its original hearing because of appellant's failure to allege sufficient state action. The dismissal was affirmed by this court and appellant failed to seek review in the Supreme Court. The statements in these claims, therefore, are inapplicable to appellant's separate claims under Title IX. Even if the language were applicable, however, we would still find it inadequate. Notwithstanding the liberal pleading requirements of Fed. R. Civ. P. 9(b), the generic "arbitrary and invidious" language does not incorporate any necessary implication of intentional discrimination, and we agree with the district court that the allegation that the policies were "in violation of the Fourteenth Amendment" is nothing but a legal conclusion. *Plate v. Shepard*, 446 F.2d 1239, 1244 (6th Cir. 1971). In short, appellant has alleged nothing more than that a facially neutral age policy had a disparate impact upon women due to the domestic role they have traditionally assumed prior to continuing their education. No allegations have been made from which it can be inferred that it was more likely than not that discriminatory considerations were involved in the defendant's actions. *Compare, Daye v. Harris*, ..... F.2d ....., (No. 79-2371, D. C. Cir., Jan. 15, 1981). The disparate effect alone, even if established, would not warrant relief under Title IX. The district court therefore was correct in dismissing appellant's complaint for failure to state a claim.

V

For the reasons stated previously, the district court's dismissal of appellant's complaint is affirmed. In doing so, we express no opinion on the defendants' alternative argument that the record as it presently exists establishes a sufficient legitimate explanation for appellant's rejection to avoid liability even under the disparate impact standard. Although the defendants' argument is persuasive on this issue, we need not now venture into areas the district court found no need to investigate.

AFFIRMED.

A true Copy:
Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

No. 86-730 (3)

Supreme Court, U.S.
FILED
NOV 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

# In The
# Supreme Court of the United States
## October Term, 1986

**GERALDINE G. CANNON,**
*Petitioner,*

*v.*

**LOYOLA UNIVERSITY OF CHICAGO, *et al.*,**
*Respondents.*

## JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 86-730

# In The
# Supreme Court of the United States
## October Term, 1986

GERALDINE G. CANNON,

*Petitioner,*

*v.*

LOYOLA UNIVERSITY OF CHICAGO, *et al.*,

*Respondents.*

## JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Geraldine G. Cannon asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit based on her contention that the Court of Appeals, in its opinion issued February 25, 1986,[1] erred in affirming the dismissal of her complaint as barred by the judgments in her three prior lawsuits against the respondents.

Specifically, Mrs. Cannon argues that the dismissal of two prior actions for failure to state a claim upon which

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[1] *Cannon* v. *Loyola University of Chicago*, 784 F.2d 777 (7th Cir. 1986). A copy of the opinion appears in the Appendix to the petition at A-1. References to the Appendix will be given as "A-___" and to the Supplemental Appendix filed later by Mrs. Cannon as "Supp. App. ___."

relief could be granted and of legal claims in the third suit on Eleventh Amendment grounds were dismissals for lack of jurisdiction and could not bar the present suit.

Respondents Loyola University of Chicago ("Loyola"), Northwestern University ("Northwestern"), Rush–Presbyterian–St. Luke's Medical Center ("Rush"), Southern Illinois University ("SIU"), The University of Chicago ("Chicago"), the University of Health Sciences/The Chicago Medical School ("Chicago Medical"), and the Board of Trustees of the University of Illinois ("Illinois") respectfully submit that the decision of the Court of Appeals was fully consistent with previous decisions of this Court and that the Petition should be denied.

## STATEMENT OF THE CASE

This petition for a writ of certiorari is but the latest in a long series of unsuccessful lawsuits, motions for reconsideration, and appeals all stemming from Geraldine G. Cannon's failure to be admitted to medical school in 1975 and thereafter. Indeed, as the Seventh Circuit Court of Appeals noted in the decision which plaintiff seeks to have this Court review (A-2):

> The present appeal marks the plaintiff's *thirteenth time* she has been before the court to obtain judicial relief from the decisions of the universities not to admit her to medical school ten years ago. (Emphasis added.)

Mrs. Cannon first applied for admission to the September 1975 entering classes of ten medical schools, including all seven in Illinois, which are the respondents here. None of the ten schools offered her admission.

In July 1975 Mrs. Cannon filed lawsuits in the United States District Court for the Northern District of Illinois against The University of Chicago (75-C-2402) ("*Cannon I*") and Northwestern University (75-C-2424) ("*Cannon II*"). In both suits Mrs. Cannon alleged that the defendants had violated the Age Discrimination in Employment

Act, 29 U.S.C. §626 ("ADEA"), by considering the age of applicants; or, in the alternative, that such consideration of age had a disparate impact upon females in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 *et seq.* ("Title IX"), the Civil Rights Act of 1871, 28 U.S.C. §1983 ("§1983"), or Section 799 of the Public Health Service Act, 42 U.S.C. §295h-9.

The district court consolidated Mrs. Cannon's two suits and dismissed the complaints on the grounds that there was no state action upon which to ground a §1983 claim, there was no basis for an ADEA cause of action because defendants were neither employers nor employment agencies with respect to plaintiff, and there was no private right of action under either Title IX or the Public Health Service Act. *Cannon* v. *University of Chicago*, 406 F. Supp. 1257 (N.D. Ill. 1976). The Seventh Circuit affirmed. 559 F.2d 1063 (7th Cir. 1977).

This Court granted plaintiff's petition for a writ of certiorari solely on the issue of whether a private right of action could be implied under Title IX and subsequently found that a private action could be maintained under the statute. 441 U.S. 667 (1979).

Upon remand, The University of Chicago and Northwestern moved to dismiss Mrs. Cannon's complaint. The district court found that Title IX could be violated only by purposeful or intentional discrimination and that Mrs. Cannon alleged only a disparate impact upon females. The district court therefore dismissed the complaint for failure to state a claim upon which relief could be granted. Unpublished Orders, Nos. 75-C-2402 and 75-C-2724 (N.D. Ill. May 23, 1980). The Seventh Circuit affirmed that decision and denied Mrs. Cannon's subsequent motions to amend. 648 F.2d 1104 (7th Cir. 1981). The Supreme Court denied plaintiff's petition for a writ of certiorari. 454 U.S. 1128 (1981).

In addition, while defendants' motions to dismiss

*Cannon I* and *Cannon II* were pending, Mrs. Cannon sought injunctive relief, petitioning the district court for a preliminary injunction that would require defendants to admit her to the 1979 entering class at their medical schools. After a six-day evidentiary hearing, the district court denied Mrs. Cannon's request for an injunction, and the Seventh Circuit affirmed the denial. Unpublished Order, Case No. 79-2207 (7th Cir. April 25, 1980).

Then in 1979 Mrs. Cannon filed suit against the five other medical schools in Illinois, which are also respondents here – Loyola University of Chicago, Rush-Presbyterian-St. Luke's Medical Center, Southern Illinois University, the University of Health Sciences/The Chicago Medical School, and the University of Illinois (79-C-5009) ("Cannon III"). In this suit plaintiff alleged that defendants' denials of her medical school applications were sex discrimination in violation of Title IX; age discrimination in violation of the Age Discrimination Act of 1975, 42 U.S.C. §§6101-07; and, with respect to S.I.U. and Illinois, a violation of 28 U.S.C. §1983. The district court dismissed the action as to Rush, Loyola, and Chicago Medical on grounds of laches and as to S.I.U. and Illinois on grounds of mootness. Unpublished Orders, No. 79-C-5009 (N.D. Ill. October 13, 1981 and June 15, 1981). The Seventh Circuit Court of Appeals affirmed the judgment as to all defendants but ruled as to S.I.U. and Illinois on grounds of laches rather than mootness.[2] *Cannon* v. *University of Health Sciences*, 710 F.2d 351 (7th Cir. 1983).

Mrs. Cannon then filed her fourth lawsuit, this time

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[2] The Medical College Admissions Test ("MCAT") had been drastically changed since Mrs. Cannon took the test in 1974. The district court therefore found and the Court of Appeals affirmed that there had been a prejudicial change in circumstances such as to constitute laches (see Supp. App. C-5 - C-6, C-19 - C-21).

naming all seven schools sued in *Cannon I* through *Cannon III* as defendants (Case No. 84-C-8063) ("Cannon IV"). In *Cannon IV* Mrs. Cannon again alleged that defendants had violated Title IX, based upon her theory that using age as a criterion for admission to medical school, although not unlawful in itself when she applied to medical school, had a disparate impact upon women. In an effort to avoid the effect of the rulings in *Cannon I* through *Cannon III*, Mrs. Cannon labelled this action a breach of contract. Inasmuch as the "breach of contract" alleged here was in fact identical to the alleged violations of Title IX and other statutes that Mrs. Cannon had alleged in her three previous actions and that had been ruled upon in those actions, the district court dismissed *Cannon IV* and awarded defendants their attorneys' fees and costs. *Cannon* v. *Loyola University of Chicago*, 609 F. Supp. 1010 (N.D. Ill. 1985). The Seventh Circuit affirmed the dismissal on the ground that this action was barred by the rulings in the previous suits against these defendants, affirmed the award of attorneys' fees and costs, and awarded additional fees and costs to defendant for the appeal. 784 F.2d 777 (7th Cir. 1986). Mrs. Cannon now seeks a writ of certiorari on that ruling.

It should also be noted that after the Seventh Circuit affirmed the dismissal of *Cannon IV* as barred by the rulings in Mrs. Cannon's prior suits and while Mrs. Cannon's motions for rehearing were pending, she filed a fifth suit against the same seven defendants in state court alleging again that the defendants' rejection of her applications had breached a contract by violating Title IX. Defendants filed a timely petition for removal on the ground that Mrs. Cannon had alleged a federal question by grounding her complaint upon supposed violations of Title IX (Case No. 86-C-5437) ("*Cannon V*"). After removal, defendants moved for dismissal and sanctions including fees and an injunction barring the continued filing of suits against these defendants based

upon the same factual allegations as *Cannon I* through *Cannon V*. The district court dismissed *Cannon V*, holding that this case was "yet another clone of plaintiff's earlier suits against the defendants." Unpublished Order, No. 86-C-5431 (N.D. Ill. August 4, 1986). The motion for sanctions is still pending. Based upon the history of Mrs. Cannon's litigation against the medical schools which rejected her applications in 1975 and thereafter, there is every likelihood that Mrs. Cannon will take *Cannon V* on the same lengthy, time-consuming, and costly journey through the courts that we have seen from *Cannon I* through *Cannon IV*.[3]

## REASONS FOR DENYING THE WRIT

As the history of Mrs. Cannon's attacks on the rejections of her medical school applications clearly demonstrates, she willfully refuses to recognize that she has had her day in court – and, in fact, much more. Instead, she persists in bringing the same allegations before the courts under different labels and ceaselessly prolongs her vexatious litigation. Much as Mrs. Cannon might wish to keep this litigation alive, neither the facts nor the law give any support to that wish. She has not stated any grounds whatsoever upon which she is entitled to a further review by this Court and her petition for a writ of certiorari must be denied.[4]

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[3] It should be noted that all seven defendants are non-profit institutions. Justice Powell in his dissent in *Cannon* v. *University of Chicago*, 441 U.S. 677, 747 (1979), expressed concern regarding imposing "[t]he burden of expensive, vexatious litigation upon institutions whose resources are often severely limited . . . ." The history of Mrs. Cannon's litigation demonstrates that Justice Powell's concern was well-founded.

[4] As counsel for respondents pointed out in oral argument in *Cannon III* and as the Seventh Circuit noted in ruling on that appeal, Mrs. Cannon could seek admission to medical

*(Footnote continued on the following page)*

## I. Mrs. Cannon Fails To Demonstrate That The Decision Below Conflicts With The Rulings Of This Court Or Of Other Circuits.

Mrs. Cannon bases her petition first upon her contention that the ruling in *Cannon I and II* should not be considered a final judgment on the merits and that the Seventh Circuit's decision giving the *Cannon I and II* ruling preclusive effect conflicts with this Court's decision in *Costello* v. *United States*, 365 U.S. 265 (1961), and with decisions of other circuits in *Carter* v. *Telectron, Inc.*, 554 F.2d 1369 (5th Cir. 1977), *cert. denied*, 439 U.S. 1074 (1979), and *Johnston* v. *Earle*, 245 F.2d 793 (9th Cir. 1957). This argument however flatly ignores what was in fact decided in *Cannon I and II*. The courts found there that Title IX could be violated only by *intentional* discrimination on the basis of sex – not by actions alleged to have a disparate impact – and further found that Mrs. Cannon did not allege any action by The University of Chicago and Northwestern that could be deemed intentional discrimination. On that basis, it was found that Mrs. Cannon failed to state a claim upon which relief could be granted. In other words, even if taken as true in every particular, what Mrs. Cannon had alleged was not a violation of federal law. As this Court stated in *Bell* v. *Hood*, 327 U.S. 678, 681-82 (1945):

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4 *(Continued)*
school at any time simply by taking the revised Medical College Admission Test and reapplying to the defendant medical schools, none of which consider age in any way at present (Supp. App. C-20). The Seventh Circuit noted that perhaps Mrs. Cannon would not be competitive with others applying for medical school at present and observed (Supp. App. C-20 n. 11):

> This uncertainty, in fact, appears to be the reason Cannon continues to press for equitable relief in the face of statements by the defendants that she would receive due – and nondiscriminatory – consideration when and if she reapplied.

> . . .it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.

The Seventh Circuit properly relied upon this language in affirming the dismissal of *Cannon IV* (A-6).

Likewise, the decision in *Cannon III* that Mrs. Cannon's action was barred by a prejudicial change in circumstances – *i.e.*, the change in the Medical College Admissions test after she took that test – was a decision that reached the merits of Mrs. Cannon's claim and disposed of the case on that basis. The Seventh Circuit Court of Appeals therefore properly found that Mrs. Cannon's action was also barred by the doctrine of *res judicata* as to the other five medical schools named in *Cannon IV*.

That decision of the Seventh Circuit does not conflict with rulings in other circuits or by this Court. The issue in *Johnston* v. *Earle*, 245 F. 2d 793 (9th Cir. 1957), was whether the federal court had jurisdiction of a strictly state-law claim of tortious seizure and conversion of plaintiff's property by officers of the Internal Revenue Bureau, absent diversity or pendent jurisdiction. Having obtained a favorable judgment on the merits below, the defendants abandoned their contention on appeal that the federal district court lacked jurisdiction. The Ninth Circuit properly held that (245 F.2d at 794):

> Such an abandonment of jurisdiction cannot create it where absent, however pleasing to these office holders it would be if we sustained their successful contentions on the merits below.

This is far different from a situation in which – as in the instant case – the federal court has jurisdiction of the subject matter of plaintiff's claim but finds that the allegations of the complaint do not state a violation of the federal statute in question and that plaintiff therefore has failed to state a claim.

*Carter* v. *Telectron, Inc.*, 554 F.2d 1369 (5th Cir.

1977), is equally inapplicable to the instant case. *Carter* concerned circumstances in which the plaintiff had sought only to have the Fifth Circuit modify a lower court dismissal for lack of jurisdiction to a dismissal without prejudice. Mrs. Cannon did not seek such relief in any of her prior suits, and the rulings in those suits, which were affirmed by the Seventh Circuit and upon which this Court denied certiorari, all operate as final judgments on the merits of Mrs. Cannon's allegations of discrimination.

Nor does this Court's decision in *Costello* v. *United States,* 365 U.S. 265 (1961), aid Mrs. Cannon's position. This Court did not suggest anywhere in *Costello* that dismissals of complaints in circumstances like those of *Cannon I* through *Cannon III* do not operate as final adjudications precluding the refiling of the same complaint under a different label. Indeed, it is clear that, where the courts have found that the allegations of a complaint do not constitute a violation of a federal statute or that the complaint is barred on the grounds of laches or mootness, a final judgment has been made upon the merits of the case.

In short, the Seventh Circuit's well-reasoned rejection of Mrs. Cannon's attempt to bring her previously dismissed claims against these defendants under a new label was correct and in no way conflicts with decisions of this Court and other circuits.

## II. Mrs. Cannon's Eleventh Amendment Contentions Are Without Merit.

Contrary to Mrs. Cannon's contention, she raises no unsettled question of federal law with respect to the Eleventh Amendment issues herein. Mrs. Cannon's entire concern with this issue is speculative inasmuch as the question she seeks to pose is the possible *res judicata* effect of a decision in a federal action for prospective relief permitted by the Eleventh Amendment "on the issue of liability in a later state court action for retrospective relief" (Petition at 9). This question is purely hypotheti-

cal, and it is not the function of the Supreme Court to issue advisory opinions on such questions.

## REQUEST FOR SANCTIONS

As the history of this litigation demonstrates, Mrs. Cannon has pursued her claims far beyond the bounds of good faith. As the district court held in *Cannon IV* in awarding sanctions (Supp. App. B-11):

> Attorneys are expected, even required, to represent their clients' interests zealously. But they are also expected to know when to give up on an obviously lost cause. It should have been apparent to Cannon's counsel that Cannon's cause was dead.

Likewise, the Court of Appeals held in affirming the award of fees and costs and granting additional fees and costs (A-8):

> We are in complete agreement with the district court that Mrs. Cannon's filing of a complaint in this action was an egregious and blatant violation of Rule 11 of the Federal Rules of Civil Procedure.

Plaintiff's continued pursuit of this groundless lawsuit after the sharp rebukes by the district court and the Seventh Circuit Court of Appeals manifests a total disregard by plaintiff and her counsel of judicial process and the obligations of a lawyer to that process. Rule 11 requires that "lawyers who litigate carelessly now must take the consequences." *In re TCI Ltd.*, 769 F.2d 441, 446 (7th Cir. 1985). Defendants therefore request that this Court award them their attorneys' fees and costs incurred in responding to Mrs. Cannon's petition for a writ of certiorari.

## CONCLUSION

For all the reasons stated above, defendants respectfully request that the United States Supreme Court deny plaintiff's petition for a writ of certiorari and award defendants their costs and attorneys' fees.

Respectfully submitted,


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No. 86-730

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In The

# Supreme Court of the United States

October Term, 1986

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**GERALDINE G. CANNON,**

*Petitioner,*

*v.*

**LOYOLA UNIVERSITY OF CHICAGO *et al.*,**

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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## REPLY BRIEF FOR PETITIONER

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No. 86-730

# In The
# Supreme Court of the United States
## October Term, 1986

GERALDINE G. CANNON,
*Petitioner,*

*v.*

LOYOLA UNIVERSITY OF CHICAGO *et al.*,
*Respondents.*

## REPLY ARGUMENT

### I. Respondents' Comments On The Merits Are Misleading.

Although the issue here is not whether petitioner will prevail on the merits, respondents joint brief in opposition to the petition points to certain of petitioner's qualifications and suggests that she was not admitted – or would not be admitted – to medical school on those grounds. The facts suggest otherwise.

First, respondents observe that petitioner applied to ten schools but was admitted to none. (Jt. Br. Op. p.2). Younger applicants with lower college grade point averages and Medical College Admission Test ("*MCAT*") scores

were admitted at each school. (Complaint par.15). Chicago Medical has confirmed that petitioner's average MCAT score was higher than 103 of the 117 persons admitted at that school. Petitioner's admission to none of the schools reflects the preclusive effect of the illegal age criterion at each. She was not only denied a *fair* chance of admission – she was denied *any* chance.

Second, respondents note that the MCAT was revised in 1977, long after petitioner took the test as a college senior in 1974, and renew their related suggestion of mootness which the Seventh Circuit specifically declined to affirm in the last prior action. (Jt. Br. Op. p.4 n.2, p.6n. 4). At all times here pertinent virtually every successful medical school applicant has been accepted on the basis of MCAT scores obtained during, or within one year after the completion of, his or her premedical studies. Scores on both the old and new versions of the test are fairly comparable. In fact, scores on either version were accepted for applications to both the 1978 and 1979 entering classes. In view of petitioner's higher scores than a substantial portion of the accepted applicants at each school and of approximately 90% of those accepted at Chicago Medical, respondents' suggestion that MCAT scores were the reason for the denial of her applications is absurd.

Respondents further note Justice Powell's concern for the burden of private litigation on non-profit institutions. (Jr. Br. Op. p.6n.3). That concern, however, was related to the difficulties petitioner and others might face in proving discriminatory intent. Since *Gaurdians Association of Police v. Civil Service Commission of the City of New York,* 463 U.S. 582 (1983), they need not do so. In any event, the schools reaffirmation of their age criteria for admission, long after they were aware of both the disparate impact on women and the lack of academic justification, is now clear beyond cavil.

## II. The Dismissal Of Prior State Claims For Lack Of Pendent Jurisdiction Confirms The Conflict With Decisions Of This Court And Other Courts Of Appeals On Rule 41(b).

Respondents' statement of the first two prior cases omits any reference to the claims made under state law in those actions. (Jt. Br. Op. pp. 2-4). While respondents did not and could not deny that the prior complaints asserted state as well as federal claims, the omission of any reference to the state claims obscures the full sweep of their argument. With the dismissal of all federal claims before trial, the district court did not exercise pendent jurisdiction over the state claims. *United Mineworkers v. Gibbs*, 383 U.S. 715, 726 (1966). Even if the dismissal of federal claims did operate as an adjudication on the merits as respondents claim, dismissal of the state claims as well was necessary to make the prior judgments final and bar all further claims under the doctrine of *res judicata*. Respondents do not attempt to explain how the dismissal of petitioner's state claims for lack of pendent jurisdiction could operate as a final adjudication on the merits.

Petitioner, of course, maintains that the dismissal of her prior federal claims for failure to state a claim either arising under federal law or authorized by federal civil rights law, resulted in a lack of federal jurisdiction under 28 U.S.C. §§ 1331 and 1343(4) and prevented the dismissals from operating as adjudications on the merits under Rule 41(b), Fed. R. Civ. P. (Pet. Cert. pp. 7-9). The distinctions asserted by respondents with respect to the decisions of this Court and The Fifth and Ninth Circuits on which petitioner relied are no more than differences in detail without any difference in principle. (Jt. Br. Op. pp. 7-9). Prior to the decision below, the only dismissals for failure to state a claim which had operated as adjudications on the merits involved holdings that relief upon the claims stated or sought to be stated could not be granted by any court, not just by that particular court.

*Angel v. Bullington,* 330 U.S. 183 (1947). Here, the district court in the prior actions did not even consider, let alone decide, whether petitioner could obtain relief in state court.

Respondents characterize the difference between this action and all three prior actions as mere labelling. (Jt. Br. Op. p.5). They did not, however, claim that petitioner's allegation of their breach of written contracts, which is governed by the statute of limitations rather than the equitable doctrine of laches, does not properly overcome the laches ruling on which the Seventh Circuit affirmed the partial summary judgments in the last prior action. The breach of contract allegation was not advanced earlier because it would not have overcome, or even addressed, the mootness ruling on which the judgment of the district court had been based in that action. (Pet. Cert. p.6).

## III. The Eleventh Amendment Issue Is Not Premature.

Respondents' statement of the third prior case omits any reference to the dismissal of petitioner's legal claims against S.I.U. and Illinois under 42 U.S.C. §1983 and the Fourteenth Amendment on the basis of their jurisdictional immunity under the Eleventh Amendment. (Jt. Br. Op. p.4). Similarly, they omit any reference to the Seventh Circuit's affirmance of such dismissal on the same grounds, *(Ibid.)* Again, respondents do not attempt to explain how the dismissal of petitioner's legal claims against S.I.U. and Illinois for lack of federal jurisdiction by reason of the Eleventh Amendment could operate as a final adjudication on the merits. In fact, the only reason they advance for not granting certiorari on the Eleventh Amendment issue is that it is "premature." (Jt. Br. Op. pp. 9-10). But unless respondents meant to advance the novel concept of a cause of action that is *res judicata* in federal court but not in state court, the logic of their argument is unfathomable. Moreover, as respon-

dents themselves point out, petitioner did file a later action in state court which they removed to federal court and obtained the dismissal thereof on the same *res judiciata* grounds. (Jt. Br. Op. pp. 5-6).

## REPLY TO THE REQUEST FOR SANCTIONS

As indicated above and in the petition, respondents position on the questions presented, including the question of sanctions, is based primarily on the burden this litigation has placed on them. Petitioner, however, has been subjected to the burden of the same litigation. A decision on the substantive merits of her civil rights claims has been avoided thus far because the district court granted respondents' motions to dismiss some or all of the prior claims against each of them on grounds which petitioner could not cure by amendment or refiling. The court of appeals affirmed the prior judgments, but on grounds which she could so cure. (Pet. Cert. pp. 3-6). While respondents had the right to raise every pleading objection available, they can hardly complain of the burden their pursuit of such objections has engendered. Petitioner offered proper allegations to meet each pleading objection as soon as the objection was raised. In addition, respondents have proven wrong on both issues of statutory construction on which their pleading objections were based. Under *Guardians, supra,* the effect standard of the regulations is valid and damages are recoverable for intentional violations.

More importantly, the decision below conflicts with all of the applicable precedent at the time this action was filed. In fact, the district court specifically rejected the respondents' argument that the Rule 12(b)(6) dismissals in the earlier cases were necessarily on the merits and instead relied upon general preclusion principles. (609 F. Supp. at 1015; Pet. Cert. Supp. App. pp. B-7 to B-8. *Cf.* Pet. Cert. p. 3 n.1). The cases relied upon by the district court, however, held that dismissal of a prior complaint for failure to state a claim operated as an adjudica-

tion on the merits where relief on the claims stated or sought to be stated could not be granted by any court – not just by that particular court. That principle has no application to this case where the question of whether relief could be granted in state court was not considered either with respect to the claims made under state law in the first two prior cases or with respect to the legal claims for damages under federal law which were dismissed for lack of federal jurisdiction by reason of the Eleventh Amendment in the last prior case.

Accordingly, for the reasons set out above and the reasons for granting a writ of certiorari set out in the petition, the request for sanctions should be denied.

## CONCLUSION

By attempting to minimize the direct conflict of the decision below with the decisions of this Court and other courts of appeals on Rule 41(b), respondents bare the flaw in their opposition to the petition. Their omission of any reference to the dismissal of claims made under state law for lack of pendent jurisdiction or the dismissal of legal claims for lack of federal jurisdiction by reason of the Eleventh Amendment grossly distorts the prior record. In light of respondents' inability to face the issues presented in the petition without such omissions, petitioner suggests that summary reversal may be in order.

Respondents claim that the Eleventh Amendment issue is premature. But review here cannot be premature when the alleged necessity of a further state court action plainly conflicts with the removal of such an action by respondents to federal court and the dismissal thereof on the same *res judicata* grounds.

For the foregoing reasons and the reasons set out in the petition, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

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